89-1316

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RONALD BEHAGEN,

Petitioner,

v.

USA BASKETBALL and WILLIAM WALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RONALD H. BROWN
STEVEN M. SCHNEEBAUM *
CHARLES E. TALISMAN
RACHEL A. SHUB
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
Counsel for Petitioner Ronald Behagen

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Does the Amateur Sports Act of 1978 "implicitly" immunize from antitrust liability Respondents' initiation of a group boycott to prevent Petitioner—without prior notice or a hearing—from playing professional basketball in Europe?

2. Assuming the Amateur Sports Act does immunize Respondents' anticompetitive conduct, is such purported authorization for that conduct insufficient to subject Respondents to the Constitutional obligation to provide due process?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the United States Court of Appeals for the Tenth Circuit are listed in the caption of the case in this Court. Respondent Amateur Basketball Association of the United States of America has changed its name to "USA Basketball."

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Ronald Behagen ("Behagen") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 28, 1989, for which rehearing was denied on November 21, 1989.

OPINIONS BELOW

The opinion of the Tenth Circuit reversing the jury verdict and judgment of the district court is reported at 884 F.2d 524. (Appendix A hereto, 1a.) The opinion of the appeals court denying rehearing with a suggestion of rehearing *en banc* is unreported. (App. B, 18a.) Opinions in the district court (D. Col. C.A. No. 82-K-410) are unreported. A jury verdict was rendered on December 19, 1986. The judgment of the district court entering the jury verdict was issued on January 2, 1987. (App. D, 23a.) The Order denying motions for judgment *n.o.v.* or a new trial was issued on April 29, 1987, along with an award of attorneys fees and costs. (App. C, 20a.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1; the Amateur Sports Act of 1978, Pub. L. No. 606, 95th Cong., 2d Sess., 92 Stat. 3045, *codified at* 36 U.S.C. §§ 371-382b, 391-396; and the due process clause of the Fifth Amendment to the United States Constitution. Relevant portions of these are set forth in Appendix E at 25a.

JURISDICTION

The Court has jurisdiction to hear this petition under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 28, 1989, and rehearing was denied on November 21, 1989.

STATEMENT OF THE CASE

Petitioner Ronald Behagen earned his living playing basketball, in the United States and in Europe, until the fall of 1979. His career ended abruptly when Respondents, the Amateur Basketball Association of the United States of America ("ABA/USA") and its executive director, William Wall ("Wall"), initiated a group boycott, without notice or a prior hearing, which precluded Behagen from offering his professional services overseas. After seeking unsuccessfully to regain his eligibility to play, Behagen brought suit in federal court.

In December 1986, after a five-day trial, a federal jury in Colorado found that Respondents had conspired with others in an unreasonable restraint of United States foreign commerce, in violation of the Sherman Act. The jury also found that, because Respondent ABA/USA had been designateod as a "National Governing Body" under the Amateur Sports Act of 1978, 36 U.S.C. § 371 *et seq.* ("the Amateur Sports Act" or "the Act"), Respondents' actions in denying Behagen his right to earn a living in his chosen profession constituted a governmental deprivation of liberty or property without due process of law, in violation of the Fifth Amendment to the United States Constitution.

The Tenth Circuit Court of Appeals reversed the judgment entering the verdict, holding that (1) Respondents' authority granted under auspices of the Amateur Sports Act constituted an implied repeal of the Sherman Act, and (2) that the same grant of authority was insufficient to render Respondents' conduct "government action" for purpose of Constitutional due process analysis. It is to review this decision, denying him any federal remedy and placing Respondents beyond any judicial review or accountability, that Behagen seeks a writ of certiorari.

A. Factual Background [1]

1. *The Bizarre World of "Amateur" Basketball*

This case arises in the bizarre setting of "amateur" basketball. As the court of appeals (App. 3a, n.1) and witnesses at trial acknowledged, the "amateur" label here —used to curtail Behagen's career—bears little relation to normal definitions, which posit "amateur" as the opposite of "professional" or "paid."

In the United States, those who earn a living playing basketball are considered "professionals." During the time period relevant to this case, there were two American "professional" leagues: the National Basketball Association ("NBA"), which provided jobs for 278 to 295 players, and the Continental Basketball Association, which employed 75 more.

Overseas, however, virtually every player who earns a living on the basketball court is deemed an "amateur," and is licensed as such. No attempt is made to hide the fact that the players are paid, or otherwise to justify the "amateur" label. In every sense of the word, these players are professional athletes.

Because the United States produces many highly skilled basketball players who are unable to compete in the "professional" leagues here, there is a high demand for American players overseas. An estimated 50 to 65 ex-NBA players at any time earn a living overseas playing "amateur" basketball; about 1200 Americans altogether are earning a living playing in leagues overseas.

Thus, there is substantial commerce between the United States and the rest of the world in the market for basketball playing services.[2] Presiding over this market,

---

[1] This petition notes below several specific instances where the Tenth Circuit substituted its version of the facts for the jury's, or ignored key facts favorable to Behagen. Accordingly, citations to the trial transcript and trial exhibits are provided, although these are not set forth in the Appendices. Citations are designated "Tr. (witness's name) (page)" or "Tr. (Exhibit number)."

[2] The overseas market for American players was sufficiently important that the NBA Players Association saw fit some years ago

and deciding who may offer his services and who may not, is the Amateur Basketball Association of the United States of America, the U.S. member of the Federation Internationale de Basketball Amateur ("FIBA"). The *sine qua non* for an American player to earn his living playing basketball overseas is an ABA/USA card—obtained by paying a fee to ABA/USA—certifying that the player is qualified for "amateur" play.[3]

In the case of a "professional" player who wants to go overseas to earn a living, the situation is even more complex. Those players needed to be "reinstated" to "amateur" status before obtaining their ABA/USA cards. Approximately 300 ex-"professionals" had applied for "reinstatement" prior to the relevant dates in this case. It was again ABA/USA who presided over this determination, nominally by "recommending" a player to FIBA for reinstatement, but in fact by passing on his eligibility and by issuing the appropriate decision. There was not a single instance where FIBA refused to reinstate a player "recommended" by ABA/USA. (Tr. (Wall) 222.) Indeed, in many cases ABA/USA merely notified FIBA that a player had already been "reinstated" and, upon payment by the player of a fee varying with the duration of his "professional" status, supplied the ABA/USA "amateur" card that was the passport to earning a salary in Europe or elsewhere.[4] Over ninety percent of all "reinstatement"

---

to litigate whether the overseas "amateur" leagues were, in fact, "professional" as that term is used in the standard NBA players' contract. A federal court held that, regardless of label, the overseas leagues were in fact professional leagues. (Tr. (Fleisher) 634-36.)

[3] Nominally, the player is also required to have a FIBA license, which is issued after confirmation that the player has received his ABA/USA card and has produced certain other paperwork. As shown at trial, the FIBA license was a mere "rubber-stamp" after the ABA/USA card was issued. (Tr. (Wall) 155, 174-75, 199, 201, 228, 446; (Batton) 529; (Lang) 555, 592; Exh. 11.)

[4] In the relevant time period, the ABA/USA application filing fee was $50, and a former NBA player was charged $200 for each year he had played in the NBA.

decisions had related to American players who had "professionalized" themse'ves by playing in the United States, since only the United States (and the Philippines, evidently a *de minimis* exception) has a league styled "professional."

In making "reinstatement" decisions, ABA/USA applied FIBA guidelines providing rationales for "reinstatement," including:

1. Having signed up for a professional club before having reached age twenty-two.
2. Having engaged in a "recognized professional occupation" for a least one full year.
3. Having suffered from *severe illness* or having been the victim of an *incapacitating accident.*

These were, however, not "hard and fast rules, but rather "guidelines" that were "deliberately vague." (Tr. Exhs. 40, 41, 43; (Wall) 209.) ABA/USA fully recognized that "the reinstatement rules are a joke." (Tr. Exh. 20.) A mere note from one's doctor, for example, could qualify a player as having suffered an "incapacitating accident" and qualify him to go on earning a living playing high quality basketball overseas. (Tr. (Kaner) 773, 791; (Wall) 275.) Whenever ABA/USA determined that a player qualified for "reinstatement," FIBA accepted its "recommendation," without any inquiry as to which criterion ABA/USA had applied or what, if any, evidence supported ABA/USA's decision.

The only reason for "reinstatement" to "amateur" status is to allow the player to play overseas and earn money. A "reinstated amateur" is not eligible to play in the Olympics, the Pan-American games, or on any other national team selected to represent its country in international competition. Nor does "reinstatement" qualify a player to return to National Collegiate Athletic Association or other sanctioned interscholastic play.

The paradox here is that ABA/USA's authority to regulate who can and who cannot *earn a living* playing

basketball is linked to its status as America's "National Governing Body" ("NGB") for *amateur* basketball. Under the Amateur Sports Act of 1978, 36 U.S.C. § 371 *et seq.*, (App. 25a), Congress empowered the United States Olympic Committee to recognize one NGB for each amateur sport, which is required to be a member of the international federation for that sport. 36 U.S.C. § 391 (b)(4). As discussed *infra*, neither the purposes underlying the Act nor the authority granted by it purport to regulate a person's right to earn a living playing sports, yet ABA/USA has misused its position as the NGB for basketball to achieve that end, acting as a licensing agency for professional players, collecting fees for itself and increasing its profile as a force for athletes to reckon with in the process.

2. *The Behagen Case*

An All-American basketball player in college, Ronald Behagen played as a professional in the National Basketball Association from 1973 through 1979. He never became a "superstar" in the NBA, and was frequently traded. By 1979, no longer skilled enough to last a full season with any NBA team, and married with two children, he hoped to find a more stable life elsewhere. In the summer of 1979, his agent, Scott W. Lang, arranged a guaranteed full-year contract for him to play professional basketball for a team in Siena, Italy for the following 1979-80 season.

Behagen signed a contract with the Siena team soon after his arrival. The contract made no effort to disguise the fact that Behagen would be paid well for the sole purpose of playing basketball for the Siena team. Behagen was paid a salary of $54,000 and benefits, including rent-free housing, use of a car and airfare home. The contract also provided that the Siena team would "reimburse the player for the cost associated with securing an ABA/USA license." Behagen had no idea what that meant, having never heard of ABA/USA, but he assumed that his new team would take care of whatever

administrative requirements might be involved in his move overseas. (Tr. (Behagen) 38.)

On the Siena team, Behagen played against other teams in the Italian league. During that 1979-80 season, Behagen played so well that one of the Siena team managers considered him the preeminent player of his 14-year career with the club.

In March of 1980, Behagen returned to the United States for a short visit. While attending a professional basketball game here, he was approached by the Washington Bullets' general manager about filling in for an injured player for the few games remaining that season. He agreed, signed a ten-day contract, and appeared in six regular season games and two playoff games—a total of 78 minutes. Behagen's Bullets games were covered in the Italian press and were well known to basketball aficionados in Italy, including the Siena team management. (Tr. (Ciccarelli) 990.)

After playing for the Bullets, Behagen returned to Europe, played for Siena in the summer tournament and was invited to play for his team again in the 1980-81 season. Behagen was offered a raise in salary and an increase in benefits, including transportation and accommodation for his family. He signed a contract for 1980-81, which contained no reference to an ABA/USA license.

Just before the beginning of the 1980-81 season, however, the Siena team management informed Behagen that despite his contract, he could not play after all, because a man named William Wall of the ABA USA had declared him ineligible. (Tr. (Behagen) 37, 58, 61, 62, 68.) Demanding an explanation, Behagen was told for the first time about the need for "amateur" status.

Behagen eventually learned that in 1979-80, he had apparently been certified as a "reinstated" "amateur" directly by FIBA without having received an ABA/USA license and without having paid their fee. (Tr. (Behagen) 69.) Since Behagen had played a few games for the

Washington Bullets in the meantime, ABA/USA told him that he had "re-professionalized" himelf, and would need to be "reinstated" to "amateur" status a second time. Through his agent, Behagen contacted Respondents to make the necessary arrangements for another "reinstatement." This was impossible, Behagen was told, because of what was claimed to be a FIBA rule prohibiting second "reinstatements"—a rule which had never been published but which, according to ABA/USA and Wall, precluded Behagen's return.

As Behagen conclusively showed at trial, but for the actions of ABA/USA and Wall, his short stint with the Bullets would not have barred his return to the Italian "amateur" league. By FIBA's own admission, it had no "hard and fast rule" against second "reinstatements"; in fact, several players had been reinstated a second time. (Tr. (Wall) 433-450.)[5] Nevertheless, ABA/USA and Wall insisted that Behagen should be permanently barred from playing in the "amateur" leagues overseas.[6] Upon learning from Behagen's agent that FIBA might allow his return if ABA/USA consented, Wall demanded Behagen's exclusion in a telex to the Secretary General of FIBA:

> I cannot believe you told Scott Lang, who represents Ron Behagen, that "it was an internal problem of the USA to permit Behagen to play in Italy." We have been endorsing your no second reinstatement

---

[5] The Tenth Circuit, substituting its view for that of the jury, found that "FIBA had interpreted its regulations to forbid more than one reinstatement for any one player, although the parties here dispute the extent to which this no-second-reinstatement rule was known outside FIBA at the time." (App. 2a-3a.) The evidence easily supports the jury's conclusion that *no such rule* existed before the Behagen case, and that only the acts of ABA/USA and Wall caused the "rule" to be implemented as to Behagen.

[6] The Tenth Circuit erroneously characterizes ABA/USA's role as one of passively accepting FIBA's decision. (App. 3a-4a.) This version of the facts was suggested to the jury (Tr. (Defendants' Closing Statement) 1140-44), contested by Petitioner and rejected.

> rule interpretation of the FIBA Eligibility Committee, *although it is not written in any of your regulations.*
>
> * * * *
>
> The Italy league is a mockery of your rules and all amateurism.
>
> * * * *
>
> *The reinstatement rules are a joke.* You need to say anyone may be reinstated from professional one time, no second reinstatement, and make it stick. Today is the day.

(Tr. (Exh. 20); emphasis added.) Faced with Respondents' demands, FIBA declined to "reinstate" Behagen, citing the alleged but unpublished "rule" against second "reinstatements."

Behagen and his agent attempted to appeal the decision. They were passed from ABA/USA to FIBA and from FIBA to ABA/USA, neither of which offered any procedural mechanism through which Behagen could present his case. (Tr. (Behagen) 71-72; Exhs. 13, 18, 20, 24, 33.) According to Wall, the "due process appeal" ultimately extended to Behagen was the opportunity to meet with FIBA's Secretary General, Boris Stankovic, in a bar in Rome. (Tr. (Wall) 238-9.) Absent ABA/USA's approval and recommendation—which FIBA had never once overturned [7]—Behagen's pleas were ignored. Since he no longer had an opportunity to play as a "professional" in the United States, Behagen's career as a basketball player was over.

B. Proceedings Below

Behagen filed his complaint in the United States Court for the District of Colorado in 1982, naming ABA/USA, Wall, and FIBA as defendants. The complaint alleged, *inter alia*, that ABA/USA and Wall had conspired with FIBA and the "amateur" leagues and teams to form a group boycott in restraint of United States foreign

---

[7] Indeed, FIBA indicated that it would "reinstate" Behagen if ABA/USA asked it to do so. (Tr. (Behagen) 68; Exhs. 20, 34.)

commerce, reducing competition in the market for basketball playing services and causing direct injury to Behagen, in violation of Sherman Act § 1. The complaint also alleged that Respondents had denied Behagen his liberty or property rights without due process of law, in violation of Constitutional obligations imposed upon ABA/USA by reason of its status as a National Governing Body under the Amateur Sports Act.[8] Subject-matter jurisdiction rested on both the presence of federal questions and diversity of citizenship.

The complaint sought declaratory and injunctive relief, requalifying Behagen as an "amateur," in addition to money damages. By the time of trial in 1986, however, returning to basketball was no longer a viable option for Behagen, who had not played at a highly competitive level in more than six years. Behagen therefore sought only damages at trial. Defendant FIBA settled the case before trial, after unsuccessfully contesting the court's exercise of personal jurisdiction.[9]

A five-day jury trial was held from December 15 to 19, 1986. In their defense, Respondents argued vigorously that FIBA, not they, had caused any injury to Behagen; that Behagen or his agent had caused his own injury; that FIBA would have barred his play even without Respondents' involvement; that Respondents' actions, even if in restraint of trade, were "reasonable"; and that Respondents were merely doing what ABA/USA was required to do as a FIBA member.

The jury rejected these arguments. On a special verdict form, the jury found that Respondents had conspired with others in an unreasonable restraint of United States foreign commerce, causing injury to Behagen in the amount of $186,600 on his Sherman Act claim. The jury also found that Respondents deprived Behagen of his lib-

---

[8] Behagen also alleged breach of contract, a theory which was dropped prior to trial, and tortious interference with contract.

[9] *Behagen v. Amateur Basketball Ass'n of the United States*, 744 F.2d 731 (10th Cir. 1984), *cert. denied*, 471 U.S. 1010 (1985).

erty or property rights without due process, in violation of the Fifth Amendment to the Constitution, and awarded compensatory damages of $200,000.[10] The district court entered judgment, trebling the antitrust verdict, adding attorneys' fees and costs pursuant to 15 U.S.C. § 15, and subtracting Petitioner's settlement with FIBA. (App. 23a, 20a.) Motions for judgment notwithstanding the verdict or a new trial were denied.

On appeal, the United States Court of Appeals for the Tenth Circuit reversed the jury's verdict, holding that (1) Respondents' actions were exempt from antitrust scrutiny because they were necessary to carry out the provisions of the Amateur Sports Act, and (2) at the same time, Respondents' government-sanctioned acts did not rise to the level of government action for purposes of Constitutional due process analysis. (App. 17a.)

The Tenth Circuit's antitrust holding was reached *sua sponte*. The issue of implied repeal of the antitrust laws had never been briefed or argued before it or in the court below. The court reasoned that:

> Behagen complains of exactly that action which the Act directs—the monolithic control of an amateur sport by the NGB for that sport and by the appropriate international sports federation of which the NGB is a member. This truth is underscored by the fact that the ABA/USA could not be authorized under the Act unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation. See 36 U.S.C. § 391(b)(4). We hold that the defendants' actions were necessary to implement the clear intent of Congress, and therefore are exempt from the federal antitrust laws.

(App. 11a.)

Despite its conclusion that "the monolithic control exerted by a NGB over its amateur sport is a direct result

---

[10] The jury found for Respondents on Behagen's claim of tortious interference with contract.

of the congressional intent expressed in the Amateur Sports Act" (App. 9a), and that ABA/USA's actions in the Behagen case "were necessary to implement the clear intent of Congress" (App. 11a), the Tenth Circuit also reversed the judgment on the due process issue, "for want of requisite government action." (App. 17a.) In so holding, the Tenth Circuit relied on this Court's decision in *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987), which found that the USOC's refusal to license its Congressionally-granted trademark over the word "Olympics" was not government action. The Tenth Circuit claimed that "from this certain ground that the USOC is not a governmental actor, it follows *a fortiori* that the ABA/USA is also not a governmental actor." (App. 15a.)

Behagen petitioned for rehearing of the Tenth Circuit's antitrust holding, but the petition was denied on November 21, 1989.

REASONS FOR ALLOWING THE WRIT

This case, based on the arbitrary restriction of an individual's right to practice his chosen profession, presents significant questions regarding the interplay between antitrust and due process jurisprudence as developed by this Court. The Tenth Circuit's decision to overturn the jury verdict has important implications not only for the forty National Governing Bodies operating under the Amateur Sports Act (twenty of which are located in the Tenth Circuit's jurisdiction), but for the other private entities that Congress has created with quasi-public powers. If allowed to stand, the decision will signal that such entities have unlimited power to regulate in areas which bear only a tenuous relation to their Congressional mandate: unfettered by the antitrust laws, yet free of due process obligations that limit arbitrary government action.

There are three principal reasons why this case merits the Court's review. First, the Tenth Circuit's holding that the Amateur Sports Act exempted Respondents' con-

duct from antitrust scrutiny undercuts and directly contradicts a long line of decisions in this Court holding that implied exemptions to the antitrust laws are disfavored and will be read into a statutory scheme only under compelling circumstances and to the minimum extent necessary. *See, e.g., Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378 (1981). These precedents do not permit an implied exemption where, as here, a regulated entity has acted on its own initiative in an area not even contemplated by government regulation. Since there is no economic regulatory scheme to substitute for the antitrust laws, no government agency to act as a check on the acts of private parties and no semblance of due process, an antitrust exemption for National Governing Bodies is entirely unwarranted.

Second, the appellate court's due process holding misreads *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987). In combination with the antitrust holding, it puts Respondents' actions—according to the court necessary to carry out the will of Congress—above the law. On the one hand, the Tenth Circuit has found that Congress has created a "monolith" exempt from the antitrust laws because its acts merely carry out the will of the legislature. On the other hand, this "monolith's" actions cannot be attributed to the government, and Respondents were free to destroy Petitioner's livelihood unencumbered by even the most basic due process obligations.

Finally, in order to bolster its legal conclusions, the Tenth Circuit lost sight of the fundamental precept that, on an appeal of a jury's verdict, the facts presented at trial and the inferences to be drawn therefrom must be viewed in the light most favorable to the party who prevailed below. The appellate court accepted Respondents' version of the facts—a version rejected by the jury. This Court's supervision is warranted to preserve the proper relationship between a jury and a reviewing court.

I. THE TENTH CIRCUIT'S CONCLUSION THAT THE AMATEUR SPORTS ACT IMPLICITLY EXEMPTED RESPONDENTS' CONDUCT FROM ANTITRUST SCRUTINY CONFLICTS WITH THIS COURT'S PRIOR DECISIONS

The Tenth Circuit's opinion reversed the antitrust verdict based upon the court's finding that ABA/USA's anticompetitive activities were necessary to carry out the intent of the Amateur Sports Act. According to this reasoning, Congress has directed NGBs to do whatever is necessary to establish and exercise "monolithic" control over their respective amateur sports, thereby imbuing any activity avowedly directed towards that end with immunity from antitrust scrutiny. The Tenth Circuit contends Respondents were entitled to conspire with others to impose unreasonable restraints on persons playing their sport for a living on foreign teams because Respondents' acts were somehow linked to their efforts to govern amateur basketball. The precedents of this Court, in light of the intent and statutory scheme of the Amateur Sports Act, establish that the Tenth Circuit decision is simply wrong.[11]

A. The Amateur Sports Act's Intent and Provisions

The Amateur Sports Act was a response to a perceived decline in Olympic performance by American athletes, resulting largely from poor organization and inadequate funding among fragmented amateur sports organizations. *See* H. Rep. No. 1627, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7478-7504. Disputes between those organizations resulted in athletes being used as "weapons in the war between rival organizations." S. Rep. No. 770, 95th Cong., 2d Sess. (1978)

---

[11] The Tenth Circuit even cites *Flood v. Kuhn*, 407 U.S. 258 (1972), as guiding precedent (App. 10a at n. 5), despite the acknowledgment that the baseball antitrust exemption is *sui generis* and survives today only out of respect for the principle of *stare decisis*. Basketball "does not enjoy exemption from the antitrust laws." *Haywood v. National Basketball Association*, 401 U.S. 1204, 1205 (Douglas, Circuit Justice 1971).

at 12. The Act establishes, *inter alia*, the uniform system by which "National Governing Bodies" are designated and authorized to regulate the various Olympic (*i.e.*, amateur) sports.

Under the Act, the United States Olympic Committee is empowered to select one National Governing Body for each Olympic sport. 36 U.S.C. § 391(a), App. 28a. In order to qualify as an NGB, an organization must meet several criteria. *Id.*, § 391(b). Among other things, a prospective NGB must demonstrate that:

- it is autonomous in the governance of its sport, it independently determines and controls all matters central to such governance, does not delegate such determination and control, and is free from outside restraint (§ 391(b)(4));
- it is a member of no more than one international sports federation (*id.*);
- it provides amateur athletes with fair notice and opportunity for a hearing before declaring them ineligible to participate in amateur athletic competition (§ 391(b)(6));
- it does not have eligibility criteria relating to amateur status which are more restrictive than those of the appropriate international sports federation (§ 391(b)(12)).

Once selected, an NGB is vested with a broad range of authority and is burdened with a series of duties under the Act. *Id.*, §§ 392, 393. Importantly here, the NGB is empowered, and indeed required, to represent the United States in the appropriate international sports federation. § 393(1). An NGB also is authorized to establish and encourage the attainment of national goals for its sport (§ 393(2)); to coordinate amateur athletic competition in the United States (§ 393(3)); to sanction games in the United States between foreign and U.S. national teams and to sanction the sponsorship of such games abroad (§ 393(4)); and to conduct amateur competition here (§ 393(5)). The most high-profile function of an NGB—which has no application to the instant case—is to

recommend to the USOC the individuals or teams that will represent the United States at the Olympic and Pan American Games (§ 393(6)), and to choose U.S. teams for lesser international competitions (§ 393(7)).

An NGB carries a number of affirmative duties corresponding to the authority it has been granted (§ 392). Above all, an NGB must "be responsible to the persons . . . it represents" (§ 392(1)), and is under a duty to "keep amateur athletes informed of policy matters and reasonably reflect the views of such athletes in its policy decisions" (§ 392(3)).

As demonstrated below, Respondents' actions vis-a-vis Behagen were not mandated or even contemplated by this statutory scheme, did nothing to further the purposes of the Act and in fact undercut the legislative intent, so far as it can be inferred.

B. Respondents' Anticompetitive and Arbitrary Actions Were Not Necessary to Carry Out the Directives of the Amateur Sports Act

Neither the text of the Amateur Sports Act nor its legislative history reveals any specific legislative intent to exempt NGBs from the antitrust laws.[12] There is no mention at all of the Sherman Act, or any potentially anticompetitive effects that the Act might have on commercial activities. This omission was not extraordinary, as Congress "simply did not envision 'amateur' athletics as it exists today." Bradshaw, *Antitrust Policy and Olympic Athletes: The United States Ski Team Goes for the Gold*, 1985 Utah L. Rev. 831, 843-44 (1985)[13] Never-

---

[12] The first paragraph of the court of appeals opinion states that "the antitrust claim is barred by the *express* intent of Congress" (emphasis added). The word choice is unfortunate and misleading; there is no express exemption in the Amateur Sports Act nor in its legislative history.

[13] The *Antitrust Policy* article provides a careful and detailed analysis of whether NGBs are implicitly exempt from the Sherman Act. After reviewing the legislative history and policies of the Act and the applicable case law, it concludes that NGB activities as

theless, the Tenth Circuit found an exemption for the actions of ABA/USA and Wall, because "the monolithic control exerted by an NGB over its amateur sport is a *direct* result of the congressional intent expressed in the Amateur Sports Act," and because Respondents' actions in the case "were *necessary* to implement the clear intent of Congress." App. 9a, 11a (emphasis added). The appellate court's conclusions, made *sua sponte* without the benefit of briefing by the parties, clearly were in error.

1. *This Court Disfavors Implied Exemptions to the Antitrust Laws Unless Absolutely Necessary to Carry Out a Specific Congressional Mandate*

The leading Supreme Court case in this area, *Silver v. New York State Stock Exchange*, 373 U.S. 341 (1963), sets forth three fundamental principles to be used in analyzing implied exemptions to the antitrust laws, each of which directly undercuts the Tenth Circuit's opinion. In *Silver*, the Court considered whether the New York Stock Exchange ("Exchange") could be held liable under the Sherman Antitrust Act for its directive, issued without notice or hearing, requiring certain Exchange members to remove private wire connections with a non-member broker/dealer. After a thorough analysis of the Securities Exchange Act of 1934, under which the Exchange regulated its member transactions in relationships with non-members, the Court concluded that the Exchange's action was indeed subject to scrutiny under the antitrust laws. First, the Court focused on the express language of the statute:

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repeal of the antitrust laws must be discerned as a matter of implication, and "[i]t is a cardinal principle of construction that repeals by implication are not favored." . . . *Repeals are to be regarded as*

---

they pertain to compensation and the endorsement market for U.S. amateurs were *not* implicitly exempted.

> *implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.*

Id. at 357 (citations omitted; emphasis added).

The Court looked to see what other mechanisms existed to safeguard against anticompetitive activities by the Exchange. Observing that the Securities and Exchange Commission had no jurisdiction to regulate the activities in question, the Court concluded:

> There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules to as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends. . . . Applicability of of the antitrust laws, therefore, rests on the need for vindication of their positive aim of insuring competitive freedom. Denial of their applicability would defeat the Congressional policy reflected in the antitrust laws without serving the policy of the Securities Exchange Act.

Id. at 358-60.

The Court went on to find that Congress could not have intended a repeal of the antitrust laws in the case before it where basic due process rights of private interests had been denied:

> Congress . . . cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner. The point is not that the antitrust laws impose the requirement of notice and a hearing here, but rather than in acting without according petitioners these safeguards in response to their request, the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation.

Id. at 364.

Thus, the essential principles of *Silver* are that (1) enactment of a statute regulating a particular area implies an exemption from the antitrust laws, if at all, only to the minimum extent necessary to make the regu-

latory scheme work; (2) where the regulatory scheme in question provides no substitute mechanism to act as a check on anticompetitive conduct, an implied repeal of the antitrust laws is especially disfavored; and (3) if the specific conduct at issue is carried out in a manner that was not absolutely necessary to further Congress's objectives in enacting its statutory scheme, then no antitrust exemption may be implied.

These fundamental principles have been reinforced over and over by this Court, by repeatedly and expressly rejecting arguments for exemption. *See, e.g., National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378 (1981); *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Carnation Co. v. Pacific Westbound Conference et al.*, 383 U.S. 213 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

Since *Silver*, there have been only two occasions where this Court has found that a Congressional regulatory scheme created an implied antitrust exemption for certain conduct. Both cases rested on the specific authority of the Securities and Exchange Commission to regulate the conduct in question. *See, United States v. National Ass'n of Securities Dealers*, 422 U.S. 694, 734-35 (1975) (implied exemption found where SEC possessed "broad regulatory authority" and where necessary to avoid inconsistent standards); *Gordon v. New York Stock Exchange*, 422 U.S. 685 (1975) (implied exemption found where statute gave SEC "direct regulatory power" over the practices in question).

The recent case of *National Gerimedical, supra*, is particularly illustrative of the principles set forth in *Silver*, and is especially apposite here. The Tenth Circuit did not even cite the case. There, a private Health Service Agency ("HSA") created pursuant to an Act of Congress had determined that there was no need for

additional hospital beds in a particular region. Attempting to further Congress's policy against wasteful duplication of medical resources, and following the HSA's determination, Blue Cross refused to enter into a reimbursement agreement with the plaintiff, a newly built hospital. The plaintiff sued Blue Cross under Sherman Act § 1, alleging a conspiracy among the HSA, Blue Cross and others to deny it facilities essential for its economic success. Blue Cross defended on the grounds that, even if such a conspiracy existed, its actions were implicitly exempt from the antitrust laws because they were in furtherance of a Congressional mandate. The Court rejected Blue Cross's argument, finding no antitrust exemption.

Notwithstanding Blue Cross's general intent to further legislative purposes, the Court found that "it cannot be argued that application of the antitrust laws to the conduct of Blue Cross would frustrate a *particular* provision of the [statute] or create a conflict with the orders of any regulatory body." 452 U.S. at 390 (emphasis added). Moreover, immunity would not be inferred from Congress's directive that the HSA should "seek . . . to implement [its plans] with the assistance of individuals and public and private entities in its health service area." The Court stressed that nothing in the statute *required* Blue Cross to take the action that was challenged as an unreasonable restraint of trade under the Sherman Act. *Id.* at 391.

National Gerimedical teaches that, at least when there is no government agency with regulatory authority over a private entity, an antitrust exemption cannot rest on a defendant's mere intention to carry out the goals of a Congressional enactment. Rather, there must be a "clear repugnancy" between application of the antitrust laws and private conduct that is specifically compelled by a particular statutory provision, before this Court will conclude that the Sherman Act has been *pro tanto* repealed.

As shown below, the Tenth Circuit ignored these principles and created a broad implicit exemption covering

conduct that was utterly unnecessary to carry out any of the directives of the Act.

2. *Respondents' Actions Were Not Compelled by the Amateur Sports Act*

a. *Respondents' Failure to Provide Behagen With Due Process Was Contrary to Congress's Express Intent*

In the Tenth Circuit's view, Behagen was complaining only about Respondents' "monolithic" control over "amateur" basketball, a degree of control which has been mandated by Congress. (App. 11a.) But Behagen's complaint is not the fact that ABA/USA and Wall control amateur basketball, but rather that Respondents have conspired with others to leverage their legitimate control in an arbitrary and anticompetitive manner which Congress clearly never contemplated, much less intended.

Correctly applying the principles elucidated in *Silver*, what the Tenth Circuit called Congress's delegation of "monolithic" control to ABA/USA is precisely that which requires ABA/USA to exercise that control fairly. The Tenth Circuit strayed far from this principle in finding an implied exemption from the antitrust laws in this case. The evidence shows that ABA/USA and Wall provided Behagen with no advance notice of the admittedly unpublished so-called "rule" that was enforced to deny him eligibility to play in Europe, provided no proper opportunity for a hearing and did not apply any such "rule" in a consistent manner.

Nothing in Congress's direction that NGBs exercise "monolithic control" over their sports requires or even suggests such arbitrary conduct. Indeed, the Act expressly requires the NGB for each sport to keep amateur athletes informed of its policies, to provide due process before denying eligibility and to maintain eligibility standards no stricter than those of the international sports federation of which it is a member. 36 U.S.C.

§§ 391(b)(6), 391(b)(12), 392(a)(1), 392(a)(3). None of those mandates was followed here.

Thus, as in *Silver*, "Congress . . . cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner." 373 U.S. at 364. Under the circumstances, Respondents' actions were *contrary* to the spirit of the Amateur Sports Act, and far from "necessary to implement the will of Congress," as the Tenth Circuit suggested.

b. *Respondents Overstepped their Congressional Mandate by Regulating Professional Athletes Playing In Intra-National Leagues Overseas*

Even putting aside Respondents' failure to provide fundamental due process, the Act does not warrant an implied antitrust exemption for Respondents, since their activities here fell outside the scope of their Congressional mandate. Congress intended NGBs to regulate the participation of U.S. teams in amateur athletic competition, not to reach across the ocean and preclude American citizens from earning a living playing sports on foreign teams.

First, nothing in the Act requires or even permits an NGB to regulate an American athlete's eligibilty to play in *intra*-national leagues overseas, such as the Italian league in which Behagen competed. The Act empowers ABA/USA to determine eligibilty for the Olympic and Pan-American Games (36 U.S.C. § 393(6)), for other United States national teams competing in "international amateur athletic competition" (§ 393(7)),[14] and for certain competitions here in the United States (§ 393(5)). Whatever authority Respondents had to determine eligibility for the Italian league did not derive from Congress and does not further any discernible Congressional purpose.

---

[14] The Act defines "international amateur athletic competition" as "amateur athletic competition between any athlete or athletes representing the United States . . . and any athlet[e] or athletes representing any foreign country." 36 U.S.C. § 373(5).

Second, although each NGB is empowered to establish eligibility standards to determine who is an "amateur athlete" within its jurisdiction, 36 U.S.C. § 393(1), it cannot be inferred that Congress intended to permit NGBs to extend their "monolithic" control into clearly professional sports merely though the fiction of deeming them to be "amateur." Yet, by precluding ex-NBA players from earning a living playing ball overseas—and thereby discouraging players from playing in the NBA for fear of losing their "amateur" status—Respondents have distorted congressional objectives by creating a bottleneck in an openly commercial marketplace.

The very parties favored by the Tenth Circuit's theory in fact avowed that the Act did not govern Behagen's situation. Respondents contended at trial that the Amateur Sports Act did not govern ABA/USA's decisions as to whether to "reinstate" players to "amateur" status. They argued the same point in their closing argument to the jury, and it was their basis for objecting to several jury instructions. (Tr. (Wall) 309-10, 395-96; (Killian) 1073-74; (Closing Argument) 1144-45; (Objections to the Charge) 7.)

At most, the Act compelled ABA/USA to become a member of FIBA, 36 U.S.C. § 393(1), and to apply "amateur" eligibility criteria no more restrictive than FIBA's, *id.*, § 391(b)(12). No provision in the Act directed ABA/USA to regulate U.S. professional players in foreign leagues, nothing compelled ABA/USA to foist upon those players rules that were unreasonable and anticompetitive and nothing required ABA/USA to take action without providing due process to those whose livelihoods would be profoundly affected by its proclamations. Under these circumstances, *National Gerimedical* mandates a finding that Respondents' conduct is not immunized from the antitrust laws, 452 U.S. at 391.

c. *An Antitrust Exemption Is Not Necessary to Protect Reasonable Conduct By Respondents in Compliance With the Amateur Sports Act*

Where Congress has not granted an express exemption to the antitrust laws, an exemption may be implied "only to the minimum extent necessary" to further the interests of other legislation. "The proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver*, 373 U.S. at 357. No exemption is required for NGBs, because other well-recognized antitrust doctrines will protect their legitimate activities.[15]

First, because the Sherman Act requires that a plaintiff suffer an injury to his "business or property," the antitrust laws will not be relevant to eligibility for *bona fide* amateur athletic competition, when it has no (or only remote) commercial effect. To the extent an NGB regulates genuinely amateur sports, it has no antitrust exposure to truly amateur athletes challenging its eligibility decisions. *E.g.*, *Jones v. National Collegiate Athletic Ass'n*, 392 F. Supp. 295, 298-99 (D. Mass. 1975).

Second, rules or restraints imposed by a sports organization are, like most non-price restraints in other areas, already subject to the antitrust "rule of reason." Thus, to the extent that NGB actions are legitimately intended to promote economic competition, for example, by making a sport more attractive to fans or viewers, again no violation would occur. *See, e.g.*, *Neeld v. National Hockey League*, 594 F.2d 1297, 1300 (9th Cir.

---

[15] On appeal, for example, Respondents argued that Behagen's business or property interests were not injured; that Behagen was not injured by reason of Respondents' conduct; and that the restraints they imposed were reasonable. Respondents also argued that their restraints had an insufficient impact on the foreign commerce of the United States to be cognizable under the antitrust laws. Respondents did not proffer the implied repeal argument adopted by the Tenth Circuit.

1979) (regulation precluding player with sight in only one eye from competing met the rule of reason test).

This is precisely the view taken by the Eighth Circuit in *Gunter Harz Sports, Inc. v. U.S. Tennis Association, Inc.*, 665 F.2d 222 (8th Cir. 1981). There, the NGB for tennis enacted a rule prohibiting the use of double-stringed tennis rackets in sanctioned competition, and the manufacturer brought an antitrust claim. The district court found defendants' rule to be justified under a rule of reason analysis, but refused to impose any blanket exemption applicable to the activities of the defendant. The Eighth Circuit affirmed both the result and the rationale of the district court.

Respondents here were given ample opportunity to explain to the jury why their actions were necessary or appropriate. (*E.g.*, Tr. (Closing Argument) 1132-33.) The jury was specifically instructed to consider whether Respondents' restraints were no broader than necessary than to achieve any legitimate goals. The jury rejected such arguments by Respondents under the "rule of reason."

The jury's verdict was fully justified. Courts have long recognized that amateur sports have a commercial side, and that side is fully subject to the antitrust laws. *See, e.g., NCAA v. University of Oklahoma Board of Regents*, 468 U.S. 85 (1984) (restrictions on NCAA member television rights violated the rule of reason); *Hennessy v. NCAA*, 564 F.2d 1136 (5th Cir. 1977) (NCAA's by-law limiting number of assistant coaches employable by members was subject to antitrust scrutiny); *Amateur Softball Association of America v. United States*, 467 F.2d 312 (10th Cir. 1972) (civil antitrust investigation not improper, *inter alia*, on grounds of "amateur" label or *Flood v. Kuhn* baseball exception).

In the instant case, Respondents regulated commercial activity under the aegis of "amateur" sports and did so in a manner that the jury found arbitrary and anti-

competitive. Given the ample protections in the antitrust laws for reasonable or non-commercial conduct, there is no basis for believing that Congress, in passing the Amateur Sports Act, intended to exempt the type of unreasonable conduct in which Respondents engaged from antitrust scrutiny.

d. *The Lack of Regulatory Oversight of NGBs Also Disfavors an Antitrust Exemption*

Finally, the Tenth Circuit failed to consider the absence of any regulatory body with authority to review Respondents' activities in light of antitrust concerns. The only organization with any supervisory control over ABA/USA and other NGBs is another private entity, the USOC, which has no mandate to regulate economic competition and, in any event, no jurisdiction to review decisions as to eligibility except for specific amateur competitions (*e.g.* the Olympic Games). Thus, "[t]here is nothing built into the regulatory scheme which performs the antitrust function of insuring that [Respondents] will not in some cases apply [their] rules so as to do injury to competition. . . ." *Silver*, 373 U.S. at 358. *See also National Gerimedical*, 452 U.S. at 390 ("the claim of an implied antitrust immunity is weaker" where there is no conflict with "the orders of any regulatory body"). The Tenth Circuit's failure to acknowledge this aspect of *Silver*, and failure even to cite *National Gerimedical*, warrant summary reversal here.

II. IF THE TENTH CIRCUIT CORRECTLY DECIDED THAT RESPONDENTS' ACTIONS WERE NECESSARY TO IMPLEMENT THE WILL OF CONGRESS, THEN THOSE ACTIONS WERE GOVERNMENT ACTIONS THAT ARE CONSTRAINED BY PROCEDURAL DUE PROCESS OBLIGATIONS

The Tenth Circuit's holding that Respondents are implicitly exempt from antitrust scrutiny is made all the more remarkable by its second holding that ABA/USA and Wall are not subject to Constitutional due process obligations. In support of its antitrust conclusions, the

appellate court found that Respondents' actions "were *necessary* to implement the clear intent of Congress," yet the court simultaneously concluded that their actions were not government action. Taken together with a prior Tenth Circuit decision that there is no private right of action under the Amateur Sports Act, *Martinez v. United States Olympic Committee*, 802 F.2d 1275, 1281 (10th Cir. 1986), the appellate court's rulings mean that there is no federal remedy for arbitrary or anticompetitive actions by these "monolithic" unregulated entities, created by Act of Congress, even when they stray from truly "amateur" competition and begin regulating people's livelihoods.

The Tenth Circuit appeared untroubled by the inconsistency between its antitrust rationale and the due process holding, and the harshness of the result. (App. 15a.) It felt constrained to dismiss Behagen's due process claim under the authority of *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987), which held that the United States Olympic Committee's refusal to license the word "Olympic" to a gay activist group was not government action for due process purposes. Reasoning that, under the Act, it is the USOC which chooses the NGBs for each sport, the Tenth Circuit determined that "[f]rom this certain ground that the USOC is not a governmental actor, it follows *a fortiori* that the ABA/USA is also not a government actor." (App. 15a.)

Petitioner submits that the appellate court read *San Francisco Arts & Athletics* too broadly, and that in any event, the conclusion that Respondents' actions here were not government action does not follow *"a fortiori"*—or at all—from this Court's conclusions about the USOC's actions in that case. First, the type of activity that was complained of in *San Francisco*, the denial of a license to use a trademark, was not a typical government function, nor were the rights that were allegedly deprived—the right to use that mark—the type of fundamental interests courts normally associate with liberty or prop-

erty. Thus, *San Francisco* should not be read as a declaration that *no* function of the USOC, could be considered government action; rather, this Court held that *the particular functions* being carried out by the USOC in that case were not government action.

The *San Francisco* Court also specifically noted that, although the Amateur Sports Act granted the USOC a trademark over the word "Olympic," nothing in the Act dictated to USOC how to exercise its discretion to license the trademark it had been granted:

> Most fundamentally, this Court has held that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." . . . The USOC's choice of how to enforce its exclusive right to use the word "Olympic" simply is not a governmental decision. There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right. At most, the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise "[m]ere approval of or acquiescence in the initiatives" of the USOC. . . . This is not enough to make the USOC's actions those of the Government. . . . Because the USOC is not a governmental actor, the [petitioner's] claim that the USOC has enforced its rights in a discriminatory manner must fail.

483 U.S. at 546-47 (citations and footnotes omitted).

Here the situation is very different. Respondents did not assert a right to license a trademark, but instead purported to license an entire profession. Not content to limit its span to genuinely amateur activity,[16] ABA/USA entered into the business of deciding who may and who may not earn a living playing basketball. Nor, so far

---

[16] The majority in *San Francisco* wrote that "neither the conduct nor the coordination of amateur sports has been a traditional government function." 483 U.S. at 545. The "coordination of amateur sports" is not at issue here.

as the Tenth Circuit was concerned, did ABA/USA have any choice in the matter; it "maintained exactly that degree of control over its sport" that was required under the Act, and its specific actions in this case were absolutely "necessary to implement the clear intent of Congress." (App. 11a.) According to the Tenth Circuit, ABA/USA prevented Behagen from earning a living playing basketball, without notice or a hearing, pursuant to that directive.

As summarized in *San Francisco*, government action is imputed to a private party when there is a close "nexus" to a public body—such as when it is compelled to act in a certain way—or when it is carrying out a traditional "government function." If the Tenth Circuit's analysis of the Amateur Sports Act is correct, then ABA/USA's conduct was compelled or significantly encouraged by Congressional action, thus meeting the *San Francisco* formulation of the "nexus" test.

Moreover, Respondents' ventures beyond amateur sports and into the licensing of professional athletics invites the conclusion that they met the "government function" test for government action as well, because regulation of who may, and who may not, be licensed to practice a particular profession is a time-honored government function. *See, e.g., Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (lawyers); *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainers); *United States v. Federal Insurance Co.*, 805 F.2d 1012 (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987) (U.S. custom house brokers); *Roach v. National Transportation Safety Board*, 804 F.2d 1147 (10th Cir. 1986) (commercial pilots); *Duva v. World Boxing Association*, 548 F. Supp. 710 (D.N.J. 1982), *vacated as moot*, 714 F.2d 121 (3d Cir. 1983) professional boxers).[17]

---

[17] Even *without* the added element of statutory authority that exists here, courts long have recognized that even purely private entities must provide due process before they may take it away:

> Where a professional association has monopoly power and membership in the association significantly affects the mem-

In sum, Respondents' acts meet both the "nexus" and the "government function" tests that have been used by this Court to determine whether private entities have due process obligations. Any conclusion to the contrary, moreover, necessarily contradicts the Tenth Circuit's finding that the Amateur Sports Act compelled Respondents' actions and thereby exempted them from antitrust scrutiny.

CONCLUSION

The antitrust and due process holdings of the Tenth Circuit cannot and should not be reconciled. Nobody—especially Respondents here—should be permitted to regulate professional lives without any form of judicial oversight and restraint. In enacting the Amateur Sports Act, Congress did not create a special category of entities, free to engage in arbitrary and unreasonable commercial acitvities with impunity. This petition for a writ of certiorari should be granted, and the decision of the Tenth Circuit set aside as inconsistent with an unbroken tradition of this Court's jurisprudence in both the application of the antitrust laws and the protection of basic due process rights.

Respectfully submitted,

RONALD H. BROWN
STEVEN M. SCHNEEBAUM *
CHARLES E. TALISMAN
RACHEL A. SHUB
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
Counsel for Petitioner
Ronald Behagen

* Counsel of Record

---

ber's practice of his profession . . . [it] must exercise its power according to its by-laws and constitution; it cannot decide to exclude or expel a member or deny rights of membership for arbitrary, capricious, or discriminatory reasons.

Dietz v. American Dental Association, 479 F. Supp. 554, 557 (E.D. Mich. 1979).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 87-1730

RONALD BEHAGEN,
Plaintiff-Appellee,
v.

AMATEUR BASKETBALL ASSOCIATION OF THE UNITED STATES OF AMERICA, and WILLIAM WALL,
Defendants-Appellants.

Aug. 28, 1989

Matthew J. Iverson (Edward F. Ruberry, of Burditt, Bowles, Radzuis & Ruberry, Ltd., Chicago, Ill., Franklin E. Lynch, of Kruse & Lynch, P.C., and Lee R. Wills and Mary E. Walta, of Wills and Gorsuch Kirgis, Colorado Springs, Colo., with him, on the briefs), of Burditt, Bowles, Radzuis & Ruberry, Ltd., Chicago, Ill., for defendants-appellants.

Steven M. Schneebaum (Charles E. Talisman and Rachel A. Shub, of Patton, Boggs & Blow, Washington, D.C., with him, on the brief), of Patton, Boggs & Blow, Washington, D.C., for plaintiff-appellee.

Before LOGAN, SETH, and TACHA, Circuit Judges.

TACHA, Circuit Judge.

This is an appeal from a jury trial awarding the plaintiff, Ronald Behagen, treble damages under the federal antitrust laws as well as damages for the deprivation of liberty or property interests without due process of law. The defendants contend on various grounds that the jury verdicts should be overturned as a matter of law. We hold that the antitrust claim is barred by the express intent of Congress and that the due process claim is barred by a lack of governmental action. We reverse.

I.

The Federation Internationale de Basketball Amateur (FIBA) is the international organization that governs amateur basketball in its member countries. The Amateur Basketball Association of the United States of America (ABA/USA) is the FIBA member organization from the United States. In order for an American to play basketball in amateur competition outside the United States, the player is required to qualify as an amateur by receiving an ABA/USA travel permit and a FIBA license.

For an American who has played professional basketball, the amateur qualification process is known as reinstatement or reintegration. A reinstated player's eligibility is still limited, however, in that the player may not qualify for a national team and therefore may not participate in competition such as the Olympic Games. During the time relevant to this case, FIBA published the following grounds for reinstatement: (1) the player had signed with a professional club prior to reaching age twenty-one and had withdrawn within the subsequent twelve-month period; (2) the player had withdrawn from professional competition in order to follow a recognized professional occupation and had been engaged in that occupation for at least one full year; or (3) the player suffered from a serious illness or was the victim of an incapacitating accident. In addition, FIBA had inter-

preted its regulations to forbid more than one reinstatement for any one player, although the parties here dispute the extent to which this no-second-reinstatement rule was known outside FIBA at that time.

The plaintiff, Ronald Behagen is a former collegiate All-American basketball player who went on to play professional basketball for several teams in the National Basketball Association. In the fall of 1979, Behagen joined a basketball team in Siena, Italy. The Italian league in which Behagen played is considered by FIBA to be an amateur league, and Behagen was therefore required to obtain amateur qualification.[1] Behagen never applied to the ABA/USA for a travel permit, but was nevertheless issued a license by FIBA. After completion of the 1979-1980 season, Behagen returned home to Atlanta where he attended an Atlanta Hawks-Washington Bullets basketball game. Behagen was subsequently approached about playing the season's few remaining games for the Bullets, and he signed a contract to play in those games.

After concluding the season with the Bullets, Behagen returned to Italy and negotiated a contract with the Siena team for the 1980-1981 season. Although he played in a few preseason and exhibition games, again he failed to take action towards obtaining reinstatement by the ABA/USA. William Wall, the executive director of the ABA/USA, informed FIBA that Behagen had once again played professional basketball in the United States. Upon learning of Behagen's professional play, FIBA in-

---

[1] Although the Italian league was considered to be an amateur league, its players were paid for playing on its teams. Because of their amateur status, however, the Italian players did not lose eligibility for Olympic competition. This situation exists throughout Europe. Consequently, it is best to treat "amateur" and "professional" in this case as merely technical terms denoting a status for purposes of the international amateur athletic organizations.

formed the Siena team that Behagen was ineligible under FIBA regulations. The team then informed Behagen that they would not honor his contract for the 1980-1981 season.

Behagen then contacted the ABA/USA and FIBA about his eligibility and was informed that FIBA had a policy against granting any player a second reinstatement. He was told that his only hope for an appeal was to contact Dr. Borislav Stankovic, the Secretary General of FIBA. Behagen met briefly with Stankovic in Rome, but the no-second-reinstatement rule was not changed.

Behagen brought suit against FIBA, the ABA/USA, and William Wall, seeking the following relief: 1) treble damages for violations of the federal antitrust laws; 2) damages for tortious interference with contract; and 3) damages for the deprivation of liberty or property interests without due process of law. The federal district court dismissed FIBA as a party, granting summary judgment on a motion based on lack of personal jurisdiction. The Tenth Circuit reversed the lower court, finding that there were factual disputes material to the personal jurisdiction issue. *Behagen v. Amateur Basketball Ass'n of the United States*, 744 F.2d 731, 735 (10th Cir.1984), *cert. denied*, 471 U.S. 1010, 105 S.Ct. 1879, 85 L.Ed.2d 171 (1985).

Behagen and FIBA subsequently settled, but the remaining defendants proceeded to a jury trial. The jury rendered its verdict in favor of the defendants on the tortious interference with contract count, but in favor of the plaintiff on the antitrust and due process counts. The district court awarded attorneys' fees and costs to the plaintiff and denied the defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The defendants then appealed the adverse judgment to this court.

II.

When a trial in federal court is a trial to the jury, our review of the evidence is "limited to the inquiry as to whether the record contains substantial evidence to support the jury's . . . conclusion, viewing the evidence in the light most favorable to the prevailing party." *Kitchens v. Bryan County Nat'l Bank*, 825 F.2d 248, 251 (10th Cir.1987). The trial court's legal conclusions, however, are subject to de novo review, *see United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526, 81 S.Ct. 294, 297, 5 L.Ed.2d 268 (1961); *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1505 (10th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 528, 102 L.Ed.2d 560 (1988), and therefore "[t]he appellate court is not bound by the trial court's conclusions of law," *State Distributors, Inc v. Glenmore Distilleries Co.*, 738 F.2d 405, 412 (10th Cir.1984). This court's power to correct errors of law encompasses "those [errors] that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, 104 S.Ct. 1949, 1959, 80 L.Ed.2d 502 (1984).

III.

The defendants first contend that the district court erred in permitting the antitrust issue to go to the jury. The plaintiff alleged that the defendants violated section 1 of the Sherman Antitrust Act (Sherman Act), 15 U.S.C. § 1,[2] by being "key participants in an illegal group boycott by FIBA, its member organizations, and the leagues governed thereby, of players who have played in

---

[2] Section 1 of the Sherman Act reads in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1.

the American professional basketball leagues more than once." The jury found that there was a combination, agreement, or conspiracy among the defendants and alleged coconspirators resulting in an unlawful restraint of trade or commerce. The jury further found that the plaintiff was injured in his business and property as a proximate result of the defendants' illegal acts, and that he sustained damages that were capable of reasonable ascertainment and not speculative or conjectural.

We agree with the defendants that the antitrust issue should not have gone to the jury. The defendants' actions in this case were clearly within the scope of activity directed by Congress, and were necessary to implement Congress' intent with regard to the governance of amateur athletics. We therefore hold that the defendants' allegedly violative actions here are exempt from the coverage of the federal antitrust laws.

We begin our analysis by examining congressional action concerning, and the current governing structures for, American involvement in international amateur sports.[3] Central to these governing structures is the organizing of competition under the auspices of the International Olympic Committee (IOC). The IOC possesses the rights to, and governs the operation of, the Olympic Games. *Michels v. United States Olympic Comm.*, 741 F.2d 155, 156 (7th Cir.1984). Each nation must be represented by a national Olympic committee that is recognized by the

---

[3] In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court formulated "the state action doctrine [which] allowed state legislatures to formally command that certain areas of commerce be exempt from the provisions of the Sherman Act." *Lease Lights, Inc. v. Public Serv. Co.*, 849 F.2d 1330, 1332 (10th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 817, 102 L.Ed.2d 807 (1989). Although the present parties have averted to the application of the state action doctrine, such an analysis is plainly inapplicable here as there is no conceivable element of action by a state. We therefore focus upon congressional intention of exempting the defendants' activity from the federal antitrust laws.

IOC, and the national committees in turn recognize a national governing body (NGB) for each Olympic sport. *Id.*

Congress chartered the United States Olympic Committee (USOC) as a "private corporation[] established under Federal law," 36 U.S.C. § 1101. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 107 S.Ct. 2971, 2984, 97 L.Ed.2d 427 (1987); *Michels*, 741 F.2d at 157; 36 U.S.C. §§ 371, 383. The USOC was recognized by the IOC as the national Olympic committee of the United States. *Michels*, 741 F.2d at 156. Congress later enacted the Amateur Sports Act of 1978, 36 U.S.C. §§ 371-382b, 391-396, to rectify the factional nature of amateur sports organizations in this country at that time. *See San Francisco Arts & Athletics*, 107 S.Ct. at 2985.

Under the Amateur Sports Act, NGB's play a major role in the governance of international amateur athletic competition. *See* 36 U.S.C. §§ 391-396. "For any sport which is included on the program of the Olympic Games or the Pan-American Games, the [USOC] is authorized to recognize as a national governing body an amateur sports organization which files an application and is eligible for such recognition. . . ." *Id.* § 391(a). Furthermore, "[t]he [USOC] shall recognize only one national governing body for each sport for which an application is made and approved." *Id.* The NGB must satisfy a number of requirements, including the ability to "demonstrate[] that it is autonomous in the governance of its sport, in that it independently determines and controls all matters central to such governance, does not delegate such determination and control, and is free from outside restraint." *Id.* § 391(b)(4).

Congress has also established the relationship between an NGB and the international organization governing a particular amateur sport. The Act authorizes an NGB to "represent the United States in the appropriate inter-

national sports federation," *id.* § 393(1), and provides that an NGB may "not have eligibility criteria relating to amateur status which are more restrictive than those of the appropriate international sports federation," *id.* § 391(b)(12). In keeping with the Congress' scheme of monolithic control for each sport, the Act provides that an NGB must "demonstrate[] that it is a member of no more than one international sports federation which governs a sport included on the program of the Olympic Games or the Pan-American Games." *Id.* § 391(b)(4). The Act also authorizes an NGB to "designate individuals and teams to represent the United States in international amateur athletic competition (other than the Olympic Games and the Pan-American Games) and certify, in accordance with applicable international rules, the amateur eligibility of such individuals and teams." *Id.* § 393(7).

The Act provides for ongoing review of the NGB by the USOC in order to ensure compliance with the Act. *Id.* § 394. In the event that an NGB is alleged to be not in compliance, the Act provides for a hearing mechanism by which certain persons or organizations can seek to compel an NGB to comply with the requirements of the Act, and for penalties of probation, revocation of recognition, or replacement of the NGB if the USOC finds that the NGB is not complying adequately with the statutory requirements. *Id.* § 395.

Here, Behagen has alleged antitrust violations by the ABA/USA—the NGB for basketball—and by its execu-

---

[4] We reach this conclusion based on our analysis of *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987). *See id.*, 107 S.Ct. at 2984-87 (holding that USOC is not governmental actor and that conduct and coordination of amateur sports not traditional governmental function). Our rationale for rejecting ABA/USA as a governmental actor is developed in greater detail in our due process discussion *infra*.

tive director. Although an NGB is a private actor,[4] the monolithic control exerted by an NGB over its amateur sport is a direct result of the congressional intent expressed in the Amateur Sports Act. In such a situation, we follow the Supreme Court's analysis in *Silver v. New York Stock Exch.*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed. 2d 389 (1963), and focus on the degree to which the private action was necessary to implement the intent of Congress.

In *Silver*, the Court considered whether the New York Stock Exchange (Exchange) could be held liable under the Sherman Act for its directive to certain Exchange members, issued without notice or hearing, requiring that they remove private wire connections with a nonmember broker-dealer. *Id.* at 342-44, 83 S.Ct. at 1249-50. In holding that the Exchange's action was within the scope of the antitrust laws, the Court examined the Securities Exchange Act of 1934, the Act under which the Exchange regulated its members' transactions and relationships with nonmembers, stating:

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and "[i]t is a cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181; *see Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457, 65 S.Ct. 716, 725-726, 89 L.Ed. 1051; *California v. Federal Power Comm.*, 369 U.S. 482, 485, 82 S.Ct. 901, 903, 8 L.Ed.2d 54. Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.

Silver, 373 U.S. at 357, 83 S.Ct. at 1257. The *Silver* Court therefore considered both the policies behind the

antitrust laws and the policy of exchange self-regulation embodied in the 1934 Act, concluding that congressional intent to exempt action from the federal antitrust laws should be implied only when necessary to implement the clear intent of Congress. *See id.* at 357, 361, 83 S.Ct. at 1257, 1259; *see also Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975) (repeal of antitrust provisions implied only when plain repugnancy exists between antitrust and regulatory provisions).

Here, the Amateur Sports Act provides definite proof of a congressional intent to authorize the USOC to recognize one and only one NGB at any given time for any one sport. *See* 36 U.S.C. § 391(a). The Act also makes clear that Congress intended an NGB to exercise monolithic control over its particular amateur sport, including coordinating with the appropriate international sports federation and controlling amateur eligibility for Americans that participate in that sport. *See id.* §§ 391(b)(4), 391(b)(12), 393(1), 393(7). Although the Amateur Sports Act does not contain an explicit statement exempting action taken under its direction from the federal antitrust laws, *compare id.* §§ 371-382b, 391-396 *with* 15 U.S.C. §§ 1291-1295 (express exemption of agreements covering telecasting of professional sports), we find that the directives of the Act make the intent of Congress sufficiently clear.[5] As the Supreme Court has stated, "The

---

[5] Reliance upon congressional intent to exempt from antitrust activity has been utilized in another context involving private action, athletics, and antitrust. The Supreme Court has long held that professional baseball enjoys an exemption from federal antitrust liability. *See Flood v. Kuhn*, 407 U.S. 258, 269-74, 285, 92 S.Ct. 2099, 2105-08, 2113, 32 L.Ed.2d 728 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 356-57, 74 S.Ct. 78, 78, 98 L.Ed. 64 (1953); *Federal Base Ball Club, Inc., v. National League of Professional Base Ball Clubs*, 259 U.S. 200, 208-09, 42 S.Ct. 465, 465-66, 66 L.Ed. 898 (1922). This exemption does not extend to other professional sports. *See Haywood v. National Basketball*

Amateur Sports Act was enacted "to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States.'" *San Francisco Arts & Athletics*, 107 S.Ct. at 2985 (quoting H.R.Rep. No. 1627, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7478, 7482).

Behagen complains of exactly that action which the Act directs—the monolithic control of an amateur sport by the NGB for that sport and by the appropriate international sports federation of which the NGB is a member. This truth is underscored by the fact that the ABA/USA could not be authorized under the Act unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation. *See* 36 U.S.C. 391(b)(4). We hold that the defendants' actions were necessary to implement the clear intent of Congress, and therefore are exempt from the federal antitrust laws. Consequently, we reverse the district court's judgment on the antitrust issue.

Ass'n, 401 U.S. 1204, 1205, 91 S.Ct. 672, 673, 28 L.Ed.2d 206 (Douglas, Circuit Justice 1971) (basketball); *Radovich v. National Football League*, 352 U.S. 445, 451-52, 77 S.Ct. 390, 393-94, 1 L.Ed.2d 456 (1957) (football); *United States v. International Boxing Club, Inc.*, 348 U.S. 236, 242, 75 S.Ct. 259, 262, 99 L.Ed. 290 (1955). The baseball exemption has persisted, however, in the face of considerable judicial consternation, *see Flood*, 407 U.S. at 286, 92 S.Ct. at 2113 (Douglas, J., dissenting) (stating that *Federal Base Ball* "is a derelict in the stream of the law"); *Radovich*, 352 U.S. at 452, 77 S.Ct. at 394 (implying that *Federal Base Ball* and *Toolson* are "unrealistic, inconsistent, or illogical"), and that persistence is based on a theory that Congress has allowed the Court's antitrust exemption for baseball to continue despite the Court's repeated statements that, if the baseball exemption is to be overruled, it is the place of Congress to do it. *See Flood*, 407 U.S. at 283-84, 92 S.Ct. at 2112; *Toolson*, 346 U.S. at 357, 74 S.Ct. at 78.

When, as here, we find a clear indication of the intent of Congress from the statute itself, rather than from Congress' acquiesence through inaction in the face of judicial construction, we find an even stronger case for inferring an antitrust exemption.

IV.

The defendants also contend that the district court erred in permitting the plaintiff's due process claim to go to the jury. The crux of the plaintiff's allegation was that the defendants "had denied him the right to earn a living in his chosen occupation without any form of adequate hearing, based on rules and standards that had no rational basis, that were not published, and that were selectively and inconsistently applied." The jury found that the defendants' acts constituted "state action," that the defendants' acts or failure to act as required caused the plaintiff to be denied a "property right" or a "liberty right," and that the plaintiff was deprived of such a right without "due process of law."

The due process clause of the fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. It is axiomatic that the fifth amendment applies to and restricts "only the Federal Government and not private persons." *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 461, 72 S.Ct. 813, 820, 96 L.Ed. 1068 (1952). Accordingly, in situations of purely private conduct, the Constitution provides no due process protection, "no matter how unfair that conduct may be." *National Collegiate Athletic Ass'n v. Tarkanian*, —— U.S. ——, 109 S.Ct. 454, 461, 102 L.Ed.2d 469 (1988) (applying due process clause of the fourteenth amendment). However, as this court has noted:

> The Supreme Court has approached the concept of governmental action flexibly. It has pragmatically examined ostensibly private activities to determine if they constitute governmental action. In this regard, the Court has inquired whether a private party is performing a "public function," *see Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90

L.Ed. 265 (1946), or acting under "state compulsion," *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), whether there is a "nexus," *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), or "joint action" between the private party and the government, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *Flagg Brothers v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978).

These cases, taken together, impart at least two important principles. First, they recognize that power entrusted to the government by the people can ultimately be exercised through nominally private entities, be it through the government's delegation, compulsion, concerted action, or acquiescence. Second, they provide that when these nominally private parties exercise governmental power, they shall not exercise it insulated from constitutional constraints.

The problem remains in distinguishing the exercise of governmental power from benign or tangential governmental involvement. This problem is resolved by "sifting facts and weighing circumstances" in each case. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961).

Gilmore v. Salt Lake Community Action Program, 710 F.2d 632, 635-36 (10th Cir.1983).

Defendant ABA/USA is at least a nominally private party. It is further removed from congressional action under the Amateur Sports Act than is the USOC. ABA/USA operates as an NGB only because of its recognition by the USOC. The Supreme Court, furthermore, has declared that "[t]he USOC is a 'private corporatio[n] es-

tablished under Federal law.'" *San Francisco Arts & Athletics*, 107 S.Ct. at 2984 (quoting 36 U.S.C. § 1101 (46)).

Behagen, however, contends that ABA/USA is a governmental actor because it undertakes to be the exclusive licensing authority for a particular profession—a function that Behagen claims is a traditional governmental function—and because Congress, by operation of the Amateur Sports Act, has bestowed upon the ABA/USA exclusive powers as an NGB.

Our analysis here is simplified by the pronouncements of the Supreme Court in *San Francisco Arts & Athletics*, which presented the Court with the issue of whether the USOC was a governmental actor under the Amateur Sports Act. *See* 107 S.Ct. at 2984-87. The Court there held that the USOC was not "a governmental actor to whom the prohibitions of the Constitution apply." *Id.* at 2984, 2986-87. In so holding, the Court rejected as bases for governmental action the congressionally-granted charter of the USOC, the regulation of the USOC by Congress, the granting to the USOC of the exclusive use of the word "Olympic," and any attempts on the part of Congress to help the USOC receive funding. *See id.* at 2985. Turning to arguments that the USOC became a governmental actor by fulfilling a traditional governmental function, the Court rejected that contention as well. *See id.* "The fact '[t]hat a private entity performs a function which serves the public does not make its acts [governmental] action,'" *id.* (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842, 102 S.Ct. 2764, 2772, 73 L.Ed. 2d 418 (1982)). The Court concluded that the Amateur Sports Act "merely authorized the USOC to coordinate activities that always have been performed by private entities," *id.*, for "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function," *id.*

Proceeding from this certain ground that the USOC is not a governmental actor, it follows a fortiori that the ABA/USA is also not a governmental actor. Congress has conferred no authority upon the ABA/USA except that authorized because of its recognition as an NGB. Such recognition by statute must come through the USOC. If the Amateur Sports Act has not created a governmental actor in the USOC, it most certainly has not done so in the ABA/USA, and, as we have observed, the Supreme Court has rejected governmental chartering, regulation, grants, or subsidies as bases for governmental action by the USOC. *See id.*

San Francisco Arts & Athletics also removes any grounds for finding the ABA/USA to be a governmental actor under a traditional governmental function rationale. Even if European basketball leagues persist in labeling their paid-for-play basketball teams as "amateur," that does not negate the fact that the ABA/USA has licensing power over play in those leagues by Americans only because Congress desired a monolithic control of amateur sports, and directed that amateur eligibility be governed by the NGB's, which operate under the aegis of the USOC. Further, as we have noted, the Supreme Court has held that such coordination and control of amateur sports is not a "traditional governmental function." *Id.* We hold that the ABA/USA is not a governmental actor to whom the due process prohibitions of the Constitution apply. Consequently, as a matter of law we reject the jury finding of "state action" in this case, and we conclude that the due process issue should never have gone to the jury. We therefore reverse the district court's judgment on the due process issue.

Finally, we note that our analysis here was not unanticipated by Congress and appears to be clearly within its intent. Congress debated provisions intended to en-

sure a federal cause of action for due process violations involving institutions under the Amateur Sports Act, and Congress rejected any such provisions. This court has previously noted the following observations of the Seventh Circuit:

> "The legislative history of the [Amateur Sports] Act clearly reveals that Congress intended not to create a private cause of action under the Act. The Act as originally proposed contained an 'Amateur Athlete's Bill of Rights,' which included a civil cause of action in federal district court for any athlete against an NGB, educational institution, or other sports organization that threatened to deny the athlete's right to participate in certain events. *See* S. 2036, 94th Cong., 1st Sess. § 304(a) (1977). As the Senate Report explains, this bill of rights provision 'met with strong resistance by the high school and college communities. Ultimately, the compromise reached was that certain substantive provisions on athletes' rights would be included in the USOC Constitution, and not in the bill.' S.Rep. No. 770, 95th Cong., 2d Sess. 5-6 (1978). Congress omitted the bill of rights provision in the Act's final version. Congress thus considered and rejected a cause of action for athletes to enforce the Act's provisions."

Martinez v. United States Olympic Comm., 802 F.2d 1275, 1281 (10th Cir.1986) (quoting *Michels*, 741 F.2d at 157-58). It is not without reason that the coordination and control of amateur sports has not been a traditional governmental function. *See Michels*, 741 F.2d at 159 (Posner, J., concurring) ("Any doubt on this score can be dispelled by the reflection that there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.").

V.

We reverse the judgment of the district court on the antitrust issue because of the clear intent of Congress to exempt the defendants' actions here from the federal antitrust laws. We reverse the district court's judgment on the due process issue, for want of the requisite governmental action. REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 87-1730

RONALD BEHAGEN,
Plaintiff-Appellee,

v.

AMATEUR BASKETBALL ASSOCIATION OF THE UNITED STATES OF AMERICA AND WILLIAM WALL,
Defendants-Appellants,

ORDER

Filed November 21, 1989

Before HOLLOWAY, Chief Judge, SETH, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35 (b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the

court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 82-K-410

RONALD BEHAGEN,
Plaintiff,

vs.

AMATEUR BASKETBALL ASSOCIATION OF THE UNITED STATES OF AMERICA, and WILLIAM WALL,
Defendants.

ORDER

[Filed April 29, 1987]

KANE, J.

This case was tried before a jury for five days in December 1986. On the fifth day of trial, I denied defendants' motion for directed verdicts on plaintiff's antitrust claim, tortious interference claim, and liability for the acts of former defendant Federation International de Basketball Amateur.

The jury returned a verdict in plaintiff's favor on two of his three claims: 15 U.S.C. § 1, and due process. Judgment was entered on the verdict on January 2, 1987.

Two motions are pending: defendants' motion for judgment notwithstanding the verdict or for new trial, and defendants' objections to plaintiff's attorney fees awarded under the antitrust laws. The motion for judgment not-

withstanding the verdict or for new trial is denied. Plaintiff's claim for attorney fees, moreover, will be reduced in the following manner:

1. No attorney fees will be awarded for work performed against former defendant Federation International de Basketball Amateur. FIBA reached a $75,000 settlement with plaintiff before trial, and any claim for costs or fees incurred in relation to FIBA was bargained away in the settlement. I therefore accept defendants' diminution of the hours listed by plaintiff's attorneys.

2. The hourly rate will accord with prevailing market rates in Denver. *See Lucero v. City of Trinidad*, No. 85-1682, slip op. at 3 (10th Cir. April 16, 1987). Following my opinion in *Wright v. U-Let-Us Sky Cap*, 648 F.Supp. 1216-1224-25 (D.Colo. 1986), I accept defendants' determination of market rates. Defendants' Response to Plaintiff's Motion for Attorneys' Fees and Costs, at 9.

3. I also agree with defendants that many of the hours listed, especially for law clerk work, are duplicative or unnecessary. *See Wright*, at 1223-24; *Lucero*, slip op. at 4-5. I accept defendants' determination of those hours which are duplicative or unnecessary. Thus, the attorney fees awarded should be $117,856.00.

4. Plaintiff's request for both a 100% contingent fee enhancement *and* a *cumulative* 30% increase on the top for exceptional success is unreasonable, especially given the prestigious status of plaintiff's law firm. In this case, the policies behind contingent fee enhancement would not be furthered significantly by an increase in the contingent fee at defendants' expense. Additionally, in the circumstances of this case, an award for both factors, even in the absence of plaintiff's cumulative calculations, would be tantamount to a double recovery of attorney fees. An exceptional success award of 30% would be reasonable. Thirty percent of $117,856.00 is $35,356.80.

5. Upon review of the pleadings on the issue, I accept defendants' cost determinations. Total costs awarded shall be $27,263.06.

Accordingly, IT IS ORDERED that defendants' motion for judgment notwithstanding the verdict or for new trial is denied. IT IS FURTHER ORDERED that judgment in the sum of $153.212.80 in attorney fees plus $27,263.06 in costs, for a total of $180,475.86, shall be entered against defendants pursuant to the judgment of January 2, 1987.

DATED at Denver, Colorado this 29th day of April, 1987.

/s/ John L. Kane, Jr.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 82-K-410

RONALD BEHAGEN,
Plaintiff,

vs.

AMATEUR BASKETBALL ASSOCIATION
OF THE UNITED STATES OF AMERICA,
and WILLIAM WALL,
Defendants.

JUDGMENT

[Filed January 2, 1987]

This Action came before the Court and a jury on December 15, 1986, for a trial lasting five days. The issues have been tried and the jury has rendered its verdict.

It is accordingly this 2nd day of January, 1987 hereby ORDERED AND ADJUDGED:

(1) that on the first count, alleging violation of the antitrust laws, judgment is entered in favor of Plaintiff Ronald Behagen and against both Defendants in the amount of $186,600, which amount is to be trebled pursuant to 15 U.S.C. § 15, for a total of $559,800, plus the costs of suit including reasonable attorneys' fees;

(2) that on the second count, alleging tortious interference with contract, judgment is entered in favor of Defendants and against Plaintiff; and

(3) that on the third count, aileging denial of Plaintiff's constitutional right to due process of law, judgment is entered in favor of Plaintiff and against both Defendants in the amount of $200,000 plus the costs of suit (excluding attorneys' fees and any costs already recovered pursuant to paragraph (1) hereof).

It is further ORDERED that the total amount of the judgment shall be reduced by $75,000 pursuant to the Stipulation For Set-off agreed to by the parties and filed with the Court.

It is further ORDERED that Plaintiff shall prepare and submit to the Court within thirty days of the date of this Order a statement of attorneys' fees and costs incurred through the date of this Order which are claimed to be recoverable pursuant to paragraphs (1) and (3) hereof. In the event that Defendants pursue further proceedings regarding the merits of this Action without success, Plaintiff may submit a supplemental statement of attorneys' fees and costs upon termination of those proceedings.

Interest shall run on the entire judgment amount of $684,800, from the date of this Order, and upon attorneys' fees and costs from the date of the Order fixing them, at the rate established by 28 U.S.C. § 1961.

/s/ John L. Kane, Jr.
JOHN L. KANE, JR.
United States District Judge

January 2, 1987

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

Excerpt from the Fifth Amendment to the United States Constitution

No person shall be . . . deprived of life, liberty or property without due process of law.

Excerpt from the Sherman Antitrust Act, 15 U.S.C. § 1 et seq.

§ 1 Trusts, etc., in restraint of trade illegal . . .

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Excerpts from the Amateur Sports Act of 1978, 36 U.S.C. § 371 et seq.

§ 371. Corporation created . . .

The following persons, to wit: [] and their associates and successors, are created a body corporate by the name of "United States Olympic Committee" (hereinafter referred to as the "Corporation"). . . .

§ 373. Definitions

As used in this chapter, the term—

(1) "amateur athlete" means any athlete who meets the eligibility standards established by the national governing body for the sport in which the athlete competes;

(2) "amateur athletic competition" means a contest, game, meet, match, tournament, regatta, or other event in which amateur athletes compete;

(3) "amateur sports organization" means a not-for-profit corporation, club, federation, union, association, or other group organized in the United States which sponsors or arranges any amateur athletic competition;

(4) "Corporation" means the United States Olympic Committee;

(5) "international amateur athletic competition" means any amateur athletic competition between any athlete or athletes representing the United States, either individually or as part of a team, and any athletic or athletes representing any foreign country;

(6) "national governing body" means an amateur sports organization which is recognized by the Corporation in accordance with section 391 of this title; and

(7) "sanction" means a certificate of approval issued by a national governing body.

§ 373. **Powers of Corporation . . .**

(a) The Corporation shall have perpetual succession and power to—

(1) serve as the coordinating body for amateur athletic activity in the United States directly relating to international amateur athletic competition;

(2) represent the United States as its national Olympic committee in relations with the International Olympic Committee and the Pan-American Sports Organization;

(3) organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games and of the Pan-American Games, and obtain, either directly or by delega-

tion to the appropriate national governing body, amateur representation for such games;

(4) recognize eligible amateur sports organizations as national governing bodies for any sport which is included on the program of the Olympic Games or the Pan-American Games;

(5) facilitate, through orderly and effective administrative procedures, the resolution of conflicts or disputes which involve any of its members and any amateur athlete, coach, trainer, manager, administrator, official, national governing body, or amateur sports organization and which arise in connection with their eligibility for and participation in the Olympic Games, the Pan-American world championship competition, or other protected competition as defined in the constitution and bylaws of the Corporation;

(6) sue and be sued;

(7) make contracts;

(8) acquire, hold, and dispose of real and personal property as may be necessary for its corporate purposes;

(9) accept gifts, legacies, and devices in furtherance of its corporate purposes;

(10) borrow money to carry out its corporate purposes, issue notes, bonds, or other evidences of indebtedness therefor, and secure the same by mortgage, subject in each case to the laws of the United States or of any State;

(11) provide financial assistance to any organization or association, other than a corporation organized for profit, in furtherance of the purposes of the Corporation;

(12) approve and revoke membership in the Corporation;

(13) adopt and alter a corporate seal;

(14) establish and maintain offices for the conduct of the affairs of the Corporation;

(15) publish a newspaper, magazine, or other publication consistent with its corporate purposes; and

(16) do any and all acts and things necessary and proper to carry out the purposes of the Corporation.

SUBCHAPTER II—NATIONAL GOVERNING BODIES

§ 391. Recognition of amateur sports organizations

(a) National governing body; application; notice and hearing

For any sport which is included on the program of the Olympic Games or the Pan-American Games, the Corporation is authorized to recognize as a national governing body an amateur sports organization which files an application and is eligible for such recognition, in accordance with the provisions of subsection (b) of this section. The Corporation shall recognize only one national governing body for each sport for which an application is made and approved. Prior to the recognition of a national governing body under the authority granted under this subchapter and in accordance with the procedures and requirements of this section, the Corporation shall hold a hearing open to the public on the application for such recognition. The Corporation shall publish notice of the time, place, and nature of the hearing. Publication shall be made in a regular issue of the Corporation's principal publication at least 30 days, but not more than 60 days, prior to the date of the hearing.

(b) Eligibility requirements

No amateur sports organization is eligible to be recognized or is eligible to continue to be recognized as a national governing body unless it—

(1) is incorporated under the laws of any of the several States of the United States or the District of Columbia as a not-for-profit corporation having as its purpose the advancement of amateur athletic competition, and has the managerial and financial capability to plan and execute its obligations;

(2) submits an application for recognition, in such form as the Corporation shall require, as a national governing body and, upon application, submits a copy of its corporate charter and bylaws and any additional information as is considered necessary or appropriate by the Corporation;

(3) agrees to submit, upon demand of the Corporation, to binding arbitration conducted in accordance with the commercial rules of the American Arbitration Association in any controversy involving its recognition as a national governing body, as provided for in section 395 of this title, or involving the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition, as provided for in the Corporation's constitution and bylaws;

(4) demonstrates that it is autonomous in the governance of its sport, in that it independently determines and controls all matters central to such governance, does not delegate such determination and control, and is free from outside restraint, and demonstrates that it is a member of no more than one international sports federation which governs a sport included on the program of the Olympic Games or the Pan-American Games;

(5) demonstrates that its membership is open to any individual who is an amateur athlete, coach, trainer, manager, administrator, or official active in the sport for which recognition is sought, or to any amateur sports organization which conducts programs in the sport for which recognition is sought, or to both;

(6) provides an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, age, sex, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring such individual ineligible to participate;

(7) is governed by a board of directors or other such governing board whose members are selected without regard to race, color, religion, national origin or sex, except that, in sports where there are separate male and female programs, it provides for reasonable representation of both males and females on such board of directors or other such governing board;

(8) demonstrates that its board of directors or other such governing board includes among its voting members individuals who are actively engaged in amateur athletic competition in the sport for which recognition is sought or who have represented the United States in international amateur athletic competition in the sport for which recognition is sought within the preceding 10 years, and that the membership and voting power held by such individuals is not less than 20 percent of such membership and voting power held in that board of directors or other such governing board;

(9) provides for reasonable direct representation on its board of directors or other such governing board for any amateur sports organization which, in the sport for which recognition is sought, conducts, on a level of proficiency appropriate for the selection of amateur athletes to represent the United States in international amateur athletic competition, a national program or regular national amateur athletic competition, and ensures that such representation shall reflect the nature, scope, quality, and strength of the programs and competitions of such amateur sports organization in relation to all other such programs and competitions in such sport in the United States;

(10) demonstrates that none of its officers are also officers of any other amateur sports organization which is recognized as a national governing body;

(11) provides procedures for the prompt and equitable resolution of grievances of its members;

(12) does not have eligibility criteria relating to those of the appropriate international sports federation; and

(13) demonstrates, if it is an amateur sports organization seeking recognition as a national governing body, that it is prepared to meet the obligations imposed on a national governing body under section 392 of this title.

(c) Period within which to comply with eligibility requirements; suspension or revocation of recognition

(1) Except as provided in paragraph (2), any amateur sports organization which on November 8, 1978, is recognized by the Corporation to represent a particular sport shall be considered to be the national governing

body for that sport. Such an organization is exempt for a period of 2 years from November 8, 1978, from meeting the requirements of subsection (b) of this section, and during the 2-year period shall take the necessary actions to meet such requirements if it desires to retain its recognition. After the expiration of the 2-year period, such an organization shall continue as the national governing body for that sport unless the Corporation determines that such organization is not in compliance with the requirements of subsection (b) of this section, in which event the Corporation shall—

(A) suspend the recognition of such national governing body;

(B) revoke the recognition of such national governing body; or

(C) extend the 2-year period for not longer than 1 year, if the national governing body has proven by clear and convincing evidence that, through no fault of its own, it needs additional time to comply with such requirements.

If, at the end of the extension period referred to in subparagraph (C) of this paragraph, the national governing body has not complied with such requirements, the Corporation shall revoke the recognition of such national governing body. Any such national governing body aggrieved by the Corporation's determination under this subsection may submit a demand for arbitration in accordance with section 395(c) of this title.

(2) Notwithstanding the provisions of paragraph (1), the Corporation may suspend or revoke the recognition of a national governing body during the 2-year period if such suspension or revocation is for the same reason as the Corporation could have revoked or suspended such national governing body prior to November 8, 1978.

(d) Recommendation of national governing body as United States representative to appropriate international sports federation

Within 61 days after recognizing an amateur sports organization as a national governing body, in accordance with subsection (a) of this section, the Corporation shall recommend and support in any appropriate manner such national governing body to the appropriate international sports federation as the representative of the United States for that sport.

§ 392. **Duties of national governing bodies**

(a) For the sport which it governs, a national governing body is under duty to—

(1) develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents;

(2) minimize, through coordination with other amateur sports organizations, conflicts in the scheduling of all practices and competitions;

(3) keep amateur athletes informed of policy matters and reasonably reflect the views of such athletes in its policy decisions;

(4) promptly review every request submitted by an amateur sports organization or person for a sanction (A) to hold an international amateur athletic competition in the United States; or (B) to sponsor United States amateur athletes to compete in international amateur athletic competition held outside the United States, and determine whether to grant such sanction, in accordance with the provisions of subsection (b) of this section;

(5) allow an amateur athlete to compete in any international amateur athletic competition conducted under its auspices or that of any other amateur

sports organization or person, unless it establishes that its denial was based on evidence that the organization or person conducting the competition did not meet the requirements stated in subsection (b) of this section;

(6) provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis;

(7) encourage and support amateur athletic sports programs for handicapped individuals and the participation of handicapped individuals in amateur athletic activity, including, where feasible, the expansion of opportunities for meaningful participation by handicapped individuals in programs of athletic competition for able-bodied individuals;

(8) provide and coordinate technical information on physical training, equipment design, coaching, and performance analysis; and

(9) encourage and support research development, and dissemination of information in the area of sports medicine and sports safety.

(b) As a result of its review under subsection (a)(4) of this section, if a national governing body does not determine by clear and convincing evidence that holding or sponsoring an international amateur athletic competition would be detrimental to the best interest of the sport, the national governing body shall promptly grant to an amateur sports organization or person a sanction to—

(1) hold an international amateur athletic competition in the United States, if such amateur sports organization or person—

(A) pays to the national governing body any required sanctioning fee, if such fee is reasonable and nondiscriminatory;

(B) demonstrates that—

(i) appropriate measures have been taken to protect the amateur status of athletes who will take part in the competition and to protect their eligibility to compete in amateur athletic competition,

(ii) appropriate provision has been made for validation of records which may be established during the competition,

(iii) due regard has been given to any international amateur athletic requirements specifically applicable to the competition,

(iv) the competition will be conducted by qualified officials,

(v) proper medical supervision will be provided for athletes who will participate in the competition, and

(vi) proper safety precautions have been taken to protect the personal welfare of the athletes and spectators at the competition, and

(C) submits to the national governing body an audited or notarized financial report of similar events, if any, conducted by the amateur sports organization or person; or

(2) sponsor United States amateur athletes to compete in international amateur athletic competition held outside the United States, if such amateur sports organization or person—

(A) pays to the national governing body any required sanctioning fee, if such fee is reasonable and nondiscriminatory;

(B) submits a letter from the appropriate entity which will hold the international amateur athletic competition certifying that—

(i) appropriate measures have been taken to protect the amateur status of athletes who will take part in the competition and to protect their eligibility to compete in amateur athletic competition,

(ii) appropriate provision has been made for validation of records which may be established during the competition,

(iii) due regard has been given to any international amateur athletic requirements specifically applicable to the competition,

(iv) the competition will be conducted by qualified officials,

(v) proper medical supervision will be provided for athletes who will participate in the competition, and

(vi) proper safety precautions have been taken to protect the personal welfare of the athletes and spectators at the competition; and

(C) submits a report of the most recent trip, if any, to a foreign country which the amateur sports organization or person sponsored for the purpose of having United States amateur athletes compete in international amateur athletic competition.

§ 393. Authority of national governing bodies

For the sport which it governs, a national governing body is authorized to—

(1) represent the United States in the appropriate international sports federation;

(2) establish national goals and encourage the attainment of those goals;

(3) serve as the coordinating body for amateur athletic activity in the United States;

(4) exercise jurisdiction over international amateur athletic activities and sanction international amateur athletic competition held in the United States and sanction the sponsorship of international amateur athletic competition held outside the United States;

(5) conduct amateur athletic competition, including national championships, and international amateur athletic competition in the United States, and establish procedures for the determination of eligibility standards for participation in such competitions, except for that amateur athletic competition specified in section 396 of this title;

(6) recommend to the Corporation individuals and teams to represent the United States in the Olympic Games and the Pan-American Games; and

(7) designate individuals and teams to represent the United States in international amateur athletic competition (other than the Olympic Games and the Pan-American Games) and certify, in accordance with applicable international rules, the amateur eligibility of such individuals and teams.

§ 394. Review

The Corporation may review all matters relating to the continued recognition of a national governing body and may take such action as it considers appropriate, including, but not limited to, placing conditions upon the continued recognition of the national governing body.

§ 395. Compelling compliance with eligibility requirements and performance of duties by national governing bodies

(a) Written complaint: exhaustion of remedies requirement; hearing; determination by Corporation; probation; revocation of recognition

(1) Any amateur sports organization or person which belongs to or is eligible to belong to a national governing body may seek to compel such national governing body to comply with the requirements of sections 391(b) and 392 of this title by filing a written complaint with the Corporation. Such organization or person may take such action only after having exhausted all available remedies within such national governing body for correcting deficiencies, unless it can be shown by clear and convincing evidence that those remedies would have resulted in unnecessary delay. The Corporation shall establish procedures for the filing and disposition of complaints received under this subsection. A copy of the complaint shall also be served on the applicable national governing body.

(2) Within 30 days after the filing of the complaint, the Corporation shall determine whether the organization has exhausted its remedies within the applicable national governing body, as provided in paragraph (1) of this subsection. If the Corporation determines that any such remedies have not been exhausted, it may direct that such remedies be pursued before the Corporation will further consider the complaint.

(3)(A) Within 90 days after the filing of a complaint under paragraph (1) of this subsection, if the Corporation determines that all such remedies have been exhausted, it shall hold a hearing to receive testimony for the purpose of determining if such national governing body is in compliance with the requirements of sections 391(b) and 392 of this title.

(B) If the Corporation determines, as a result of the hearings conducted pursuant to this subsection, that such national governing body is in compliance with the requirements of sections 391(b) and 392 of this title, it shall so notify the complainant and such national governing body.

(C) If the Corporation determines, as a result of hearings conducted pursuant to this subsection, that such national governing body is not in compliance with the requirements of sections 391(b) and 392 of this title, it shall—

(i) place such national governing body on probation for a specified period of time, not to exceed 180 days, which it considers necessary to enable such national governing body to comply with such requirements, or

(ii) revoke the recognition of such national governing body.

(D) If the Corporation places a national governing body on probation pursuant to this paragraph, it may extend the probationary period if the national governing body has proven by clear and convincing evidence that, through no fault of its own, it needs additional time to comply with such requirements. If, at the end of the period allowed by the Corporation, the national governing body has not complied with such requirements, the Corporation shall revoke the recognition of such national governing body.

(b) Replacement of incumbent national governing body.

(b)(1) Any amateur sports organization may seek to replace an incumbent as the national governing body for a particular sport by filing with the Corporation a written application for such recognition. Such application shall be filed (A) within the 1-year period after the final day of any Olympic Games, in the case of a sport for

which competition is held in the Olympic Games or in both the Olympic and Pan-American Games; or (B) within the 1-year period after the final day of any Pan-American Games, in the case of a sport for which competition is held in the Pan-American Games and not in the Olympic Games. If two or more organizations file applications for the same sport, such applications shall be considered in a single proceeding.

(2) Any application filed under this subsection shall be filed with the Corporation by registered mail. The Corporation shall establish procedures for the filing and disposition of application received under this subsection. A copy of any such application for recognition shall also be served on the applicable national governing body. The Corporation shall inform the applicant for recognition that its application has been received.

(3) Within 180 days after receipt of an application filed under this subsection, the Corporation shall conduct a formal hearing to determine the merits of the application. The Corporation shall publish notice of the time and place of such hearing in a regular issue of its principal publication at least 30 days, but not more than 60 days, prior to the date of the hearing. In the course of such hearing, the applicant and the national governing body shall be given a reasonable opportunity to present evidence supporting their respective positions. During such hearing, the applicant amateur sports organization must establish by a preponderance of the evidence that it meets the criteria for recognition as a national governing body under section 391(b) of this title, and that—

(A) the national governing body does not meet the criteria of section 391(b) or 392 of this title; or

(B) it more adequately meets the criteria of section 391(b) of this title, is capable of more adequately meeting the criteria of section 392 of this

title, and provides or is capable of providing a more effective national program of competition, than the national governing body in the sport for which it seeks recognition.

(4) Within 30 days of the close of the hearing required under this subsection, the Corporation shall—

(A) uphold the right of the national governing body to continue as the national governing body for its sport;

(B) revoke the recognition of the national governing body and declare a vacancy in the national governing body for that sport;

(C) revoke the recognition of the national governing body and recognize the applicant as the national governing body; or

(D) decide to place the national governing body on probation of not to exceed 180 days, pending the compliance of the national governing body, if such national governing body would have retained recognition except for a minor deficiency in one of the requirements of section 391(b) or 392 of this title.

If the national governing body does not comply within the prescribed time period, the Corporation shall revoke the recognition of the national governing body and either recognize the applicant as the national governing body, or declare a vacancy in the national governing body for that sport.

(5) Within 61 days after recognizing an amateur sports organization as a national governing body, in accordance with this subsection, the Corporation shall recommend and support in any appropriate manner such national governing body to the appropriate international sports federation as the representative of the United States for that sport.

(c) Arbitration of Corporation determinations

(c)(1) The right to review by any party aggrieved by a determination of the Corporation under the requirements of this section or section 391(c) of this title shall be to any regional office of the American Arbitration Association. Such demand for arbitration shall be submitted within 30 days of the determination of the Corporation. Upon receipt of such a demand for arbitration, the Association shall serve notice on the parties to the arbitration and on the Corporation, and shall immediately proceed with arbitration according to the commercial rules of the Association in effect at the time of the filing of the demand, except that—

(A) the arbitration panel shall consist of not less than three arbitrators, unless the parties to the proceeding mutually agree to a lesser number;

(B) the arbitration hearing shall take place at a site selected by the Association, unless the parties to the proceeding mutually agree to the use of another site; and

(C) the arbitration hearing shall be open to the public.

(2) The arbitrators in any arbitration are empowered to settle any dispute arising under the provisions of this chapter prior to making a final award, if mutually agreed to by the parties to the proceeding and achieved in a manner not inconsistent with the constitution and bylaws of the Corporation.

(3) Each contesting party may be represented by counsel or by any other duly authorized representative at the arbitration proceeding. The parties may offer any evidence which they desire and shall produce any additional evidence as the arbitrators believe necessary to an understanding and determination of the dispute. The arbitrators shall be the sole judges of the relevancy and

materiality of the evidence offered. Conformity to legal rules of evidence shall not be necessary.

(4) All decisions by the arbitrators shall be by majority vote unless the concurrence of all is expressly required by the contesting parties.

(5) Final decision of the arbitrators shall be binding upon the involved parties, if such award is not inconsistent with the constitution and bylaws of the Corporation.

(6) The hearings may be reopened, by the arbitrators upon their own motion or upon the motion of any contesting party, at any time before a final decision is made, except that, if any contesting party makes such a motion, all parties to the decision must agree to reopen the hearings if such reopening would result in the arbitrators' decision being delayed beyond the specific period agreed upon at the beginning of the arbitration proceedings.

§ 396. Jurisdiction of restricted amateur athletic competitions; national governing body sanction for international amateur athletic competitions

Any amateur sports organization which conducts amateur athletic competition, participation in which is restricted to a specific class of amateur athletes (such as high school students, college students, members of the Armed Forces, or similar groups or categories), shall have exclusive jurisdiction over such competition. If such an amateur sports organization wishes to conduct international amateur athletic competition to be held in the United States, or sponsor international amateur athletic competition to be held outside the United States, it shall obtain a sanction from the appropriate national governing body.

No. 89-1316

In The Supreme Court of the United States October Term, 1989

RONALD BEHAGEN,

Petitioner,

v.

USA BASKETBALL and WILLIAM WALL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MATTHEW J. IVERSON*
ROBERT G. EPSTEEN
BURDITT, BOWLES & RADZIUS, CHTD.
333 West Wacker Drive - Ste. 2600
Chicago, Illinois 60606-1218
(312) 781-6633

FRANKLIN E. LYNCH
KRUSE & LYNCH, P.C.
350 Holly Sugar Building
Colorado Springs, Colorado 80903
(303) 473-9911

LEE R. WILLS
THE WILLS LAW FIRM
310 Holly Sugar Building
Colorado Springs, Colorado 80903
(719) 633-8500

MARY E. WALTA
GALLEGOS LAW FIRM
141 East Palace Avenue
Santa Fe, New Mexico 87501
(505) 983-6686

**Counsel of Record*

American Reprographics Management, Inc.™ (312) 332-2764

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases *Page*

Statutes

Other Materials

No. 89-1316

In The
Supreme Court of the United States
October Term, 1989

RONALD BEHAGEN,

Petitioner,

v.

USA BASKETBALL and WILLIAM WALL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied. The decision of the Court of Appeals is supported by and consistent with the decisions of this Court, does not present a conflict between circuits, and does not involve any novel issue of law or public policy.

The unique facts of this case are unlikely to occur again because this litigation involves the distinction between "amateur" and "professional" formerly in effect in international basketball competition. That distinction has now been eliminated. This case, for this and other reasons, does not present the exceptional circumstances warranting this Court's attention. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L.Ed. 712, 714 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79, 99 L.Ed. 897, 904 (1954).

I.

THE DUE PROCESS HOLDING FOLLOWS THIS COURT'S DIRECT MANDATE

The Court of Appeals' holding that petitioner's due process claim is barred because respondents are not governmental actors is mandated by this Court's recent decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 97 L.Ed.2d 427 (1987). Under the Amateur Sports Act of 1978 (36 U.S.C. § § 371-396 and hereafter "Amateur Sports Act"), the United States Olympic Committee ("USOC") is authorized to recognize as a national governing body ("NGB") an amateur sports organization, but shall recognize only one NGB for each sport. 36 U.S.C. § 391 (a). Pursuant to that authorization, the USOC has "recognized" as the NGB for basketball the respondent, USA Basketball (formerly known as "Amateur Basketball Association of the United States of America" and referred to in the opinion of the Court of Appeals as "ABA/USA").

Petitioner has argued that the USOC's recognition of respondent USA Basketball as the NGB for the sport of basketball makes USA Basketball a governmental actor. The Court of Appeals' rejection of that contention is not only correct, it is mandated by this Court's holding in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., supra.* In that opinion, this Court held that the USOC was not a governmental actor. *San Francisco Arts & Athletics,* 483 U.S. at 547, 97 L.Ed.2d at 955. Referring to the Amateur Sports Act, which *inter alia* chartered the current USOC, the Court noted that: "[t]he fact that Congress granted it a corporate charter does not render the USOC a Government agent." *Id.* at 543, 97 L.Ed.2d at 453.

In the present case, the Court of Appeals aptly stated:

> Our analysis here is simplified by the pronouncements of the Supreme Court in *San Francisco Arts & Athletics* . . . The Court there held that the USOC was not 'a governmental actor to whom the prohibitions of the Constitution apply.'

* * * *

> Proceeding from this certain ground that the USOC is not a governmental actor, it follows a fortiori that the ABA/USA is also not a governmental actor. Congress has conferred no authority upon the ABA/USA except that authorized because of its recognition as an NGB. Such recognition by statute must come through the USOC. If the Amateur Sports Act has not created a governmental actor in the USOC, it most certainly has not done so in the ABA/USA . . . .

Behagen v. Amateur Basketball Ass'n of the United States, 884 F.2d 524, 531 (10th Cir. 1989) (Petitioner's App. at 14a - 15a) (citation omitted).

Thus, the Tenth Circuit directly follows *San Francisco Arts & Athletics*. The petitioner seeks to have this Court reverse its *San Francisco Arts & Athletics* decision less than three years after it was issued.

II.

THE ANTITRUST HOLDING FOLLOWS CONGRESSIONAL INTENT

The Court of Appeals held that when Congress enacted the Amateur Sports Act, Congress intended to exempt NGB's such as USA Basketball from the type of antitrust claim asserted by petitioner. The Court of Appeals recognized "that congressional intent to exempt action from the federal antitrust laws should be implied only when necessary to implement the clear intent of Congress." *Behagen*, 884 F.2d at 529 (Petitioner's App. at 10a). Nevertheless, applying the standard set forth in *Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L.Ed.2d 389 (1963), the Court of Appeals recognized that the Amateur Sports Act itself establishes that Congress did intend to exempt certain actions of NGB's from antitrust claims.

The Act provides that the USOC is to recognize one and only one NGB for any one sport. 36 U.S.C. § 391 (a). It grants each NGB exclusive authority and control for certain matters. More specifically, Congress has provided that an NGB such as USA Basketball must be "autonomous in the governance of its sport, in that it independently determines and controls all matters

central to such governance, does not delegate such determination and control . . . ." 36 U.S.C. § 391 (b) (4). Among the matters by legislative direction that an NGB must control is the exclusive authority to set eligibility standards that are not more restrictive than the applicable international rules. *See* 36 U.S.C. § § 373 (1) and 391 (b) (12).

In this case, petitioner asserts that respondents violated the antitrust laws when Behagen's amateur eligibility was not reinstated after his second stint as a professional basketball player in the United States. As the Court of Appeals pointed out:

> Behagen complains of exactly that action which the Act directs — the monolithic control of an amateur sport by the NGB for that sport and by the appropriate international sports federation of which the NGB is a member. This truth is underscored by the fact that the ABA/USA could not be authorized under the Act unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation. *See* 36 U.S.C. 391 (b) (4). We hold that the defendants' actions were necessary to implement the clear intent of Congress, and therefore are exempt from the federal antitrust laws.

Behagen, 884 F.2d at 529-530 (Petitioner's App. at 11a).

Because Congress has given an NGB such as USA Basketball monolithic control concerning amateur eligibility, the Court of Appeals was correct in holding that exercise of this authority is exempt from the federal antitrust laws.[1]

---

[1] *Gunter Harz Sports, Inc. v. United States Tennis Ass'n, Inc.*, 665 F.2d 222 (8th Cir. 1981), relied on by petitioner, is inapposite because the facts at issue in *Gunter Harz Sports* took place prior to the effective date of the Amateur Sports Act, which was November 8, 1978. [See the lower court opinion, 511 F. Supp. 1103, 1108-1111 (D.Neb. 1981)]. It is the Amateur Sports Act that establishes congressional intent to exempt NGB's such as respondents from the type of antitrust claim asserted by petitioner, and this Act was not at issue, or even mentioned, in *Gunter Harz Sports*.

The Court of Appeals' antitrust holding is consistent with its due process holding. Petitioner incorrectly asserts that an antitrust exemption cannot apply to a private rather than a governmental actor. But this court has found private parties exempt from the antitrust laws under the *Silver* doctrine. *E.g., United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 45 L.Ed.2d 486 (1975); *Gordon v. New York Stock Exchange*, 422 U.S. 685, 45 L.Ed.2d 463 (1975).

In *San Francisco Arts & Athletics*, this Court recognized that the persons authorized under the Amateur Sports Act were not governmental actors, and that "[t]he Amateur Sports Act was enacted 'to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States.' " 483 U.S. at 544, 97 L.E.2d at 453 (quoting H.R. Rep. No. 1627, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7482). Applying *Silver*, the Court of Appeals stated:

> Although an NGB [like USA Basketball] is a private actor, the monolithic control exerted by an NGB over its amateur sport is a direct result of the congressional intent, expressed in the Amateur Sports Act. In such a situation, we follow the Supreme Court's analysis in *Silver v. New York Stock Exch.*, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed.2d 389 (1963), and *focus on the degree to which the private action was necessary to implement the intent of Congress.*

Behagen, 884 F.2d at 528 (Petitioner's App. at 9a) (emphasis added).[2]

---

[2] Thus, Congress intended the Amateur Sports Act to eliminate problems caused by undue competition. This means petitioner's reliance on *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 358, 69 L.E.2d 89 (1981) is misplaced. *National Gerimedical* involved health care legislation where the congressional intent was the exact opposite, namely the "promotion of competition at the local, state and federal levels." *Id.* at 387, 69 L.Ed.2d at 98. This opposite congressional intent required the Court to hold there was no antitrust exemption.

For antitrust exemption purposes, the test then is not whether a private corporation is a private or governmental actor, but rather "the degree to which the private action was necessary to implement the intent of Congress." *Behagen,* 884 F.2d at 528 (Petitioner's App. at 9a). Thus a private actor like USA Basketball can also with complete consistency, as the Court of Appeals held, be exempt from the antitrust laws because of implied congressional intent.

The Court of Appeals would also necessarily have dismissed petitioner's antitrust claim on other grounds, if it had not first found an implied antitrust exemption. As a matter of law, even if otherwise applicable, Behagen could not make out a *prima facie* case for violation of the antitrust laws. In particular, subject matter jurisdiction for antitrust purposes was lacking, because Behagen's right to play basketball in Italy as a salaried employee did not have, as required, "an actual effect on United States commerce." *Montreal Trading Ltd. v. Amax, Inc.,* 661 F.2d 864, 869 (10th Cir. 1981), *cert. denied,* 455 U.S. 251 (1982).

Instead, the conduct that petitioner challenges had "insufficient contacts with and effects upon commerce within the United States to justify federal court jurisdiction. Congress did not intend to police every conspiracy in the world involving a conspirator who may be reached by federal court service of process." *Montreal Trading Ltd.,* 661 F.2d at 868. *See also Timberlane Lumber Co. v. Bank of America, N.T. and S.A.,* 549 F.2d 597, 613-15 (9th Cir. 1976), *after remand cert. denied,* 472 U.S. 1032, 87 L.Ed.2d 643 (1985); *de Atucha v. Commodity Exchange, Inc.,* 608 F.Supp. 510, 517-518 (S.D. N.Y. 1985); *Power East Limited v. Transamerica Delavel, Inc.,* 558 F. Supp. 47, 49 (S.D. N.Y. 1983), *aff'd,* 742 F.2d 1439 (2d Cir. 1983). The antitrust laws have never been applied to merely trivial effects on United States commerce. *E.g., American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 53 L.Ed. 2d 826 (1909).

Indeed, the petitioner concedes that this case involves activities outside the ambit of United States commerce and, therefore, outside the protected scope of the antitrust laws. In arguing that the activities of respondents fall "outside the scope of their Congressional mandate" and, therefore, outside any antitrust exemption, the petitioner pleads that USA Basketball

should not "reach across the ocean and preclude American citizens from earning a living playing sports on foreign teams." (Petition for Writ of Certiorari at 22). This is precisely the type of foreign activity not protected by the antitrust laws because there is not the required effect on United States commerce.

CONCLUSION

For all the reasons set forth above, this Court should deny this petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

MATTHEW J. IVERSON*
ROBERT G. EPSTEEN
BURDITT, BOWLES & RADZIUS, CHTD.
333 West Wacker Drive - Ste. 2600
Chicago, Illinois 60606-1218
(312) 781-6633

FRANKLIN E. LYNCH
KRUSE & LYNCH, P.C.
350 Holly Sugar Building
Colorado Springs, Colorado 80903
(303) 473-9911

LEE R. WILLS
THE WILLS LAW FIRM
310 Holly Sugar Building
Colorado Springs, Colorado 80903
(719) 633-8500

MARY E. WALTA
GALLEGOS LAW FIRM
141 East Palace Avenue
Santa Fe, New Mexico 87501
(505) 983-6686

Counsel of Record

No. 89-1316

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RONALD BEHAGEN,
Petitioner,

v.

USA BASKETBALL and WILLIAM WALL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONER'S REPLY BRIEF

RONALD H. BROWN
STEVEN M. SCHNEEBAUM *
CHARLES E. TALISMAN
RACHEL A. SHUB
MICHAEL S. MAURER
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
Counsel for Petitioner Ronald Behagen

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1316

RONALD BEHAGEN,

Petitioner,

v.

USA BASKETBALL and WILLIAM WALL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondents' Brief in Opposition (Op. Cert.) had two tasks to accomplish: it had to show that the facts underlying the case at bar could never recur, and it had to argue that the legal basis of the holding below, even if wrong, would not be of great significance for future cases. It succeeds at neither. The facts of the *Behagen* case may well be repeated, if not in basketball then in some other sport. And the legal principle adopted by the Tenth Circuit—an implied repeal of the Sherman Antitrust Act for National Governing Bodies for "amateur" sports—threatens to limit the effect and reach of the antitrust laws.

Respondents do nothing to undermine Behagen's conclusion that the Tenth Circuit, in reversing a jury verdict and finding an implied exemption from the antitrust laws in the language of the Amateur Sports Act, Pub. L. 95-

606, 36 U.S.C. § 371 *et seq.*, embarked on a course of judicial lawmaking both without precedent and of enormous significance. Nor do they address the inconsistency that lies at the very heart of the Tenth Circuit's opinion: that Respondents' behavior was immunized by the "clear intent" of Congress, *Behagen v. Amateur Basketball Association of the United States of America*, 884 F.2d 524, 530 (10th Cir. 1989); Petition for a Writ of Certiorari ("Pet.") at 11a, and yet that Respondents in allegedly carrying out that "clear intent" may do so in open disregard of the due process rights of their victims.

In their effort to obscure the novelty of the Tenth Circuit's analysis, Respondents do, however, suggest the existence of facts that cannot be found in the record, and introduce new legal arguments, addressed neither in the Petition nor in the decision below. It is to respond to those new matters that this Reply Brief is submitted.

I. IMPLIED REPEALS OF THE SHERMAN ANTITRUST ACT ARE STRONGLY DISFAVORED.

This Court has consistently held that antitrust waivers will be implied only in the rarest of circumstances. Indeed, in *no* case has the Court found an implied repeal of the antitrust laws where there was not a governmental authority established to regulate the subject industry.[1] *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378, 389 (1981); *see also United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975) and *Gordon v. New York Stock Exchange*, 422 U.S. 685 (1975). The decision of the Tenth Circuit in the case at bar directly contradicts that teaching by finding that the Amateur Sports Act is a *pro tanto* repeal of the

[1] Behagen does not make the argument attributed to him by Respondents that an "antitrust exemption cannot apply to a private rather than a governmental actor." Op. Cert. at 5. A private actor may be exempt, but only where a scheme of regulation (or self-regulation) is in place to police potentially anti-competitive conduct. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

Sherman Act even when no regulatory authority was created and when the actions challenged went far beyond Respondents' statutory mandate.

A. Congress Did Not Intend for NGB's to Govern Openly Professional Sports and Certainly Granted No Antitrust Exemption for That Purpose.

Respondents assert that the injustice suffered by Ronald Behagen should go unremedied because the distinction between amateurs and professionals "has now been eliminated" in international basketball competition. Op. Cert., at 1.[2]

If this assertion is true, and USA Basketball is openly regulating a professional sport, then the entire basis for the Amateur Sports Act—the statute that the Tenth Circuit found to confer blanket antitrust immunity upon National Governing Bodies ["NGBs"] for *amateur* sports —has been eviscerated, because the Congressional concerns to which the statute is addressed simply do not embrace professional athletics. Far from being a reason to deny review, Respondents' assertion trumpets the claim that the *Behagen* decision stands as a precedent permitting *all* National Governing Bodies to regulate professionals as well as amateurs in their sports, and to grant and deny eligibility to athletes without antitrust scrutiny.

Behagen did not at trial and does not now contend that there is no difference between amateurs and professional athletes. He does argue, however, that he was at all relevant times a professional, and that the NGB for amateur basketball has no official authority, statutory or otherwise, to regulate professionals. It is not for an NGB

---

[2] Nothing in the record establishes the truth of this claim, or suggests how, if true, it should be interpreted. Indeed, it was Respondents who moved *in limine* at trial to exclude evidence concerning developments in international sports organizations occurring after the facts that gave rise to this case.

created under the Amateur Sports Act to determine who may and who may not engage in a lucrative career playing sports for money overseas. To use an analogy that may be especially apt, Respondent USA Basketball stepped out of bounds—out of the bounds laid down by Congress—to foul Behagen, and now it seeks to reassure the Supreme Court that the out-of-bounds foul will never occur again, because it has unilaterally decided to expand the playing area.

If, as Respondents contend, the distinction between amateurs and professionals in international basketball has been "eliminated," then the antitrust immunity bestowed on Respondents by the Tenth Circuit would protect them from Sherman Act scrutiny even when they purport to regulate clearly professional athletes. Yet it is well settled that, of all professional sports, only baseball benefits from that exemption, for unique historical reasons. *Flood v. Kuhn*, 407 U.S. 258 (1972). Professional basketball does not enjoy such status. *Haywood v. National Basketball Association*, 401 U.S. 1204 (1971) (Douglas, Circuit Justice). Amateur organizations, such as the National Collegiate Athletic Association, are likewise subject to the antitrust laws, at least when they engage in commercial activities. *NCAA v. University of Oklahoma Board of Regents*, 468 U.S. 85 (1984).

In enacting the Amateur Sports Act, Congress surely did not intend to extend the *Flood* exemption or to create an exception to *Haywood*. If, therefore, the distinction between amateurs and professionals has been "eliminated," then the error in the Tenth Circuit's implication of antitrust immunity is more, not less, evident.[3] The

[3] Whatever changes have recently been made to permit professional basketball players some of the privileges heretofore reserved to amateurs, such as eligibility to play in the 1992 Olympic Games, can as easily be undone. Further, even the limited extension of certain amateur privileges to professionals in the sport of basketball has not been replicated in other sports. There are over

appeals court's decision rests on the "monolithic control" Congress allegedly conferred upon NGBs over *amateur* sports. *Behagen*, 884 F.2d at 529; Pet. at 11a. Behagen presented evidence to the jury that he was not at the relevant times an amateur within the meaning of the Act. Respondents simply had no authority under that statute to deprive him of his right to earn a livelihood. Congress did not confer that power upon Respondents; still less did Congress "implicitly" permit its exercise in a way that does not satisfy "rule of reason" antitrust analysis.

B. The Amateur Sports Act Was Intended to Regulate Destructive Competition Among Amateur Athletic Organizations, Not to Govern the Marketplace for Professional Players.

Respondents proffer a number of other novel legal arguments that are not part of the holding below, and that should be rejected by this Court. They try to distinguish *National Gerimedical*—the strongest condemnation of antitrust repeals by implication—on the grounds that the "congressional intent" behind the statute there construed was the promotion of competition. Op. Cert. at 5 n.2. But this simply misreads that decision. The Court did find legislative history of the statute at issue to include references to "maintaining and improving competition." 452 U.S. at 387. That contrasted, however, with other statutory expressions that competition had to be restricted. 452 U.S. at 387-8. Indeed, the Court expressly referred to and endorsed earlier decisions that there will be no blanket exemption even where Congress found "that some substitution of regulation for competition was necessary." 452 U.S. at 392 (citations omitted).

It is misleading at best to state, as do Respondents, that "Congress intended the Amateur Sports Act to

40 National Governing Bodies. While some permit professional athletes to participate in preivously amateur events (*e.g.*, tennis, ice hockey), others—such as those governing the sports of boxing and skiing—do not.

eliminate problems caused by undue competition." Op. Cert. at 5 n.2. The competition addressed by Congress in the Amateur Sports Act was the competition between *organizations* seeking to select Olympic teams and to carry out the other functions now assigned to NGBs. The Act is utterly silent as to the kind of competition at issue here: competition among individual athletes in the marketplace for basketball playing services in exchange for pay. It is inconceivable that Congress considered for an instant the relevance of the legislation to that kind of purely commercial activity.

As this Court noted in *National Gerimedical*, "[a]ntitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity." 452 U.S. at 390 (citations omitted). Here there was no such consideration and no such entity, either in the enactment of the statute or in the execution of a regulatory scheme.

The decision below is directly contradicted by *National Gerimedical*, a unanimous opinion that has never been questioned. There is simply no reason for the outcome here to be different.

C. The Court Should Decline Respondents' Invitation to Decide the Case Based on Issues Not Briefed Before It: The Tenth Circuit Already Made That Mistake.

Respondents also argue that the Tenth Circuit should be affirmed for reasons that form no part of the decision whose review is sought. They claim that their actions in denying Behagen the right to practice his chosen profession did not have an effect on United States commerce so as to come within the Sherman Act.

Interestingly, this argument was put forward at great length by Respondents in the court below, *see* Brief of Appellants at 12-17, and was rebutted by Petitioner there, *see* Brief of Appellee at 15-25. Yet the argument

did not find its way into the Tenth Circuit's decision, which turns on a contention (implied antitrust immunity for NGB's) that was not briefed or argued by either side. Respondents would turn the appellate process on its head, asking this Court to rule on the basis of an argument put forward but not adopted below, while the court below ruled on the basis of an argument briefed for the first time in this Court.

In fact, the record below amply demonstrates the substantial impact of Respondents' conduct on the foreign commerce of the United States. As Respondents' witnesses admitted at trial, the so-called "rules" that Behagen challenged in this case affected Americans almost exclusively and were deliberately intended to regulate American players' access to overseas basketball leagues. Respondents are a United States citizen and a corporation with its place of business in Colorado. Far from being "precisely the type of foreign activity not protected [*sic*] by the antitrust laws," Op. Cert. at 7, Respondents' conduct took place in the United States, directly affected the rendering of services by Americans (albeit abroad),[4] and had the result of decreasing competition by Americans for a substantial number of employment opportunities.

There is surely no basis in the case before this Court to credit Respondents' theory that their behavior did not affect the foreign commerce of the United States.[5]

---

[4] Services rendered by Americans overseas are part of the foreign commerce of the United States. *See, e.g., Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

[5] Respondents' view of the scope of the antitrust laws actually undermines their support for the grounds of the decision below. Congress surely cannot have "clearly intended" to confer antitrust immunity upon acts of Respondents that were outside the scope of the antitrust laws in the first place.

II. THE TENTH CIRCUIT'S EXONERATION OF RESPONDENTS DUE PROCESS OBLIGATIONS.

Finally, Respondents err in suggesting that Behagen asks this Court to reverse its decision in *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987). Petitioner argues that *if* Respondents' actions are above antitrust scrutiny because they were *necessary* to implement the *clear* intent of Congress to create an entity with "monolithic control", *Behagen*, 884 F.2d at 527; Pet. at 6a, then it follows logically Respondent USA Basketball is a governmental actor subject to due process obligations.

San Francisco concerned the governance of *amateur* sports; this case, the jury decided, does not. This case concerns the governmental function of determining who may and who may not practice a certain profession. *San Francisco* does not say that *no* activity of the U.S. Olympic Committee could be considered to be government action; it held that the Committee was not acting as a governmental entity because "[t]here is no evidence that the Federal Government coerced or encouraged" the USOC's conduct. *San Francisco*, 483 U.S. at 546-7.

Here, if the Tenth Circuit was right, and Respondents' conduct was compelled by congressional intent, then under *San Francisco* their actions are attributable to the government. To hold otherwise would be to place Respondents beyond the law: exempt from antitrust scrutiny because they were doing Congress's express bidding, and exempt from due process strictures because they were not.

Behagen's argument is not inconsistent with *San Francisco*. The conclusions of the Tenth Circuit are, however, inconsistent with fundamental principles of accountability, fairness, and due process of law.

CONCLUSION

The decision of the Tenth Circuit below is a dangerous precedent. It finds an implied repeal of the Sherman Act where there is no entity charged with protecting competition: a result repeatedly rejected by this Court. Its facts could easily recur, and it opens the door for widespread judicial bestowal of antitrust immunity not conferred by Congress.

Moreover, the combined effect of antitrust and due process immunity, unlimited by any language of the court of appeals, raises those who rule the world of "amateur" basketball and other sports to a level of power and authority that has no place in a democratic society. It sets them above the law.

For these reasons, Petitioner prays that the writ should issue, and the decision below should be reversed.

Respectfully submitted,

RONALD H. BROWN
STEVEN M. SCHNEEBAUM *
CHARLES E. TALISMAN
RACHEL A. SHUB
MICHAEL S. MAURER
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
Counsel for Petitioner
Ronald Behagen

* Counsel of Record